SUPREME COURT, U. S.

MAR 19 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964.

No. 1004

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC., FILM CARRIER CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC. and AIR FREIGHT FORWARDERS ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

ARTHUR R. LITTLETON,
HAROLD S. SHERTZ,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109
LOUIS P. HAFFER,
ROBERT M. BECKMAN,
703 Ring Building,
Washington, D. C. 20036
Attorneys for Appellants.

Of Counsel:
MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109

March 19, 1965.

International, 711 So. 50th St., Phila., Pa. 19143

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT OF THE CASE	6
I. C. C. Report and Order	6
Air Freight Forwarders	6
The Questions Are Substantial	8
A. The Legislative Histories of Both the Federal Aviation Act and the Interstate Commerce Act Clearly Demonstrate the Intent of Congress to Place All Through-Bill Joint Air-Motor Transportation Exclusively Under the Economic Control of the Civil Aeronautics Board	9
B. The Language of the Interstate Commerce Act Negates Any Economic Control by the I. C. C. Over Air Forwarders	12
(1) Section 203(b)(7a) of the I. C. C. Act Does Not Provide the Jurisdiction Claimed	12
(2) The I. C. C. Definition of Interstate Commerce Clearly Eliminates Control Over Commerce Partly by Motor and Partly by Air	13
C. The C. A. B. and I. C. C. Have Collided	14
D. The Federal Aviation Act Provides Adequate Redress of Grievances for All if Suffered by C. A. B. Action	16

INDEX (Continued).

Page

E. The Opinion of the Lower Court Should Not Remain Determinative, as It Is Based Upon a Misunderstanding of the Problem and Inconsistent Holdings 17

F. This Court Should, as It Has in the Past, Resolve the Important Question of Agency Jurisdiction 19

CONCLUSION 21

TABLE OF CASES CITED.

	Page
AAA Air Express, Inc., MC 124523	8
Continental Casualty Co. v. United States, 314 U. S. 527 (1941)	14
Ford v. United States, 273 U. S. 593 (1926)	14
Interstate Commerce Commission v. Agricultural Cooperative Association, 34 F. R. D. 497 (1964)	14
Interstate Commerce Commission v. Blue Diamond Products Co., 192 F. 2d 43 (8th Cir. 1951)	14
J. B. Montgomery, Inc. v. United States and Interstate Commerce Commission, 206 F. Supp. 455 (D. C. Colo. 1962) affirmed 376 U. S. 389 (1964)	12
Las Vegas Hacienda, Inc. v. Civil Aeronautics Board, 298 F. 2d 430 (9th Cir.), *cert. den.* 369 U. S. 885 (1962)	10
Pan American Airways v. United States, 371 U. S. 296 (1963)	20
Philadelphia, City of v. Civil Aeronautics Board, 289 F. 2d 770 (D. C. Cir., 1961)	8
Twentieth Century Delivery Service, Inc. v. St. Paul Fire & Marine Insurance Co., 242 F. 2d 292 (9th Cir. 1957)	16
Wyckoff Company, Inc. v. United States, Civil Action C-108-62 (D. C. Utah)	19
Zantop Air Transport, Inc. v. United States, Civil Action 25662 (D. C. E. D. Mich.)	19

STATUTES.

	Page
Interstate Commerce Act, 72 Stat. 737 as amended 49 U. S. C. 1 et seq.:	
Section 203(a)(10)	4
Section 203(b)(7a)	4, 12, 13, 19
Federal Aviation Act; 72 Stat. 737, 49 U. S. C. 1301 et seq.:	
Section 101(21)	4
Section 102	4
Section 404	5
Section 403(a)	18
Section 1006(a)	17
Air Commerce Act of 1926, 44 Stat. 568, 49 U. S. C. § 171	9, 14

MISCELLANEOUS.

	Page
1941 House Committee Report, H. Rep. 1172, 77th Cong., 1st Sess., pp. 6-7 (1941)	10

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No.

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC., FILM CARRIER CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC. AND AIR FREIGHT FORWARDERS ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania from which this appeal is taken is reported at 237 F. Supp. 450 (1964) and is printed in the Appendix hereto at pages 1a to 6a. The report and order of the Interstate Commerce Commission which was the subject of the District Court proceedings is reported at 95 M. C. C. 71 (1964) and is printed in the Appendix at pages 7a to 45a.

JURISDICTION.

The jurisdiction of this court is conferred by 28 U. S. C. § 1253 as this is an appeal from a three-judge district court. This is a civil action under 28 U. S. C. §§ 1336, 2284, 2321 and 2325, and 5 U. S. C. § 1009 to set aside an order of the Interstate Commerce Commission. The decision of the District Court was entered on December 22, 1964. The notice of appeal was filed by appellants on February 9, 1965 in the District Court for the Eastern District of Pennsylvania.

QUESTIONS PRESENTED.

The Interstate Commerce Commission has attempted to issue regulations enabling it to establish area boundaries for *air carriers* differing in extent from those areas previously established by the Civil Aeronautics Board; the Commission specifically stating it would not be bound by the Board's prior determination.

Air Dispatch, Inc., an appellant, holds authority from the Civil Aeronautics Board to provide, under a single bill of lading, transportation involving motor vehicle pick up service, aircraft carriage and motor vehicle delivery service. The proposed regulations would subject it to an immediate threat of constriction or even elimination by the Interstate Commerce Commission of a well-established heavily capitalized service area *previously approved by the Civil Aeronautics Board.*

It should be initially made clear that the only transportation involved here is that performed under "through-air bills of lading" providing bona fide pick up and delivery service by motor vehicle operating in a continuous movement in joint air-motor transportation.

The following questions are presented for determination upon this appeal:

1. When Congress in 1938 created the Civil Aeronautics Authority (now Civil Aeronautics Board) to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics, charged that agency with the duty to promote and develop air transportation, defined air transportation to include transportation "partly by aircraft and partly by other forms of transportation," contemporaneously expressly withdrew from the Interstate Commerce Commission economic regulatory jurisdiction over motor vehicle transportation "incidental to transportation by aircraft", did Congress intend that the Interstate Commerce Commission should have the authority to veto a decision by the Civil Aeronautics Board defining the scope of air transportation of property by aircraft?

2. Does not the Civil Aeronautics Board have the authority to determine when joint motor-air transportation is "air transportation" as defined in the Federal Aviation Act and therefore exempt from economic regulation by the Interstate Commerce Commission?

3. Has the Interstate Commerce Commission the authority to review the action of the Civil Aeronautics Board in accepting tariffs filed by an air carrier providing charges for collection and delivery service by motor vehicle or the authority to independently establish appropriate boundaries differing in extent from the terminal areas of such air carrier as defined in its tariff filed with and accepted by the Civil Aeronautics Board?

4. Can the Civil Aeronautics Board disclaim jurisdiction over the transportation services in connection with air transportation, which are vested in it by Congress, and by conference agreement vest such jurisdiction in the Interstate Commerce Commission?

5. Did the opinion of the lower court from which this appeal is taken properly consider and determine the issues before it?

STATUTES INVOLVED.

Section 101(21) of the Federal Aviation Act, 72 Stat. 737 (49 U. S. C. 1301):

> Interstate air transportation . . . mean[s] carriage by aircraft of persons or property as a common carrier for . . . hire . . . in commerce between (a) a place in any state of the United States . . . and a place in any other state of the United States . . . whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Section 203(a)(10) of the Interstate Commerce Act, 49 Stat. 544 as amended, 49 U. S. C. Section 303(a)(10):

> The term "interstate commerce" means commerce between any place in a state and any place in another state . . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water.

Section 203(b)(7a) of the Interstate Commerce Act, 49 Stat. 544 as amended, 49 U. S. C. Section 303(b)(7a):

> Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment, shall be construed to include . . . the transportation of persons or property by motor vehicle when incidental to transportation by aircraft.

Section 102 of the Federal Aviation Act, 72 Stat. 740, 49 U. S. C. 1302:

> In the exercise and performance of its powers and duties under this chapter, the Board shall consider

the following among other things as being in the public interest and in accordance with public convenience and necessity; (a) the encouragement and development of an air transportation system . . . (b) the regulation of air transportation in such manner as to recognize and preserve the inherent advantages of . . . and foster sound economic conditions in, such transportation . . . (c) promotion of adequate, economical and efficient service by air carriers at reasonable charges without unjust discrimination, (or) undue preferences or advantages.

Section 404, of the Federal Aviation Act, 72 Stat. 760, 49 U. S. C. 1374:

(a) It shall be the duty of every air carrier to provide and furnish interstate * * * air transportation, as provided by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation * * *; to provide safe and adequate, equipment, facilities in connection with such transportation.

STATEMENT OF THE CASE.

I. C. C. Report and Order.

The report and order here appealed from (pp. 7a-45a) was issued on May 8, 1964. The order promulgated regulations (pp. 40a to 42a) creating definite limitations as to what motor vehicle transportation shall be considered exempt from the Interstate Commerce Commission regulation and under what circumstances air freight forwarders (admittedly "air carriers" subject to regulation by the Civil Aeronautics Board) may use the facilities of a certificated motor carrier.

These regulations contain the assertion that the Interstate Commerce Commission, upon its own motion or upon a petition by an interested person, has the right to determine *de novo* the area within which an authorized air carrier may carry out its motor transportation and that such area can be changed and limited by order of the Commission alone (p. 41a, subparagraph c).

Air Freight Forwarders.

Appellant Air Dispatch Inc. is an air freight forwarder authorized to carry on its business by the Civil Aeronautics Board, Operating Authorization No. 40 of November 14, 1956. The other appellants are either associations of other air freight forwarders or interested intervening parties.

Air freight forwarders as an industry have developed an effective customer-oriented pick up and delivery service through operation of their own vehicles or by arrangement with motor carriers.

It has principally been the air freight forwarders who have made efforts to provide an integrated air-ground transportation service to the shipper *on a single through airway bill.* The air freight forwarder offers a single rate, single responsibility and expedited service in picking up

and delivering parcels, small or large, for transportation by air from consignor to consignee—that is, from door-to-door.

Generally a shipper will request an air forwarder to pick up parcels, small or large, for transportation by air to its consignee. The forwarder issues a through-air bill of lading, the shipment is picked up by motor vehicle and carried with other shipments to the air terminal chosen by the forwarder to furnish the air carriage. Here it is consolidated for shipment on a scheduled air line chosen by the forwarder. Upon the completion of the air portion, the same forwarder, through his agent, breaks the consolidated shipment down and distributes the packages to the various consignees.

This type of service is today restricted to narrowly circumscribed areas around airport cities—generally 25 miles radius. It is the expansion of these so-called C. A. B. "terminal areas" which is now under I. C. C. veto.

Beyond the existing terminal areas the rest of the nation still awaits the benefits of air transportation. Beyond the existing terminal areas, I. C. C. regulated over-the-road common carrier service must be used—and only such transportation. Same day service is impossible. Next day service becomes second day service. Second day service extends to third day, or more. If scheduled I. C. C. regulated motor carriers must be utilized at both ends of the air haul, four or five-day service is often the best that can be achieved.

To effect the most expeditious air movement, the air freight forwarder must be permitted to use its expert knowledge of both motor and air transportation services in selecting the airport and air line having the capacity and schedule for the destination airports. The Interstate Commerce Commission itself has recognized the unique service performed by air forwarders as recently as February 19, 1964. "The Commission has consistently noted that general freight carriers are not equipped to meet the

specialized needs of the air freight industry." *A. A. A. Air Express Inc.*, MC 124523.

The Questions Are Substantial.

Control of the motor transportation performed as part of air transportation is as vital as the regulation of the aircraft itself.

The problem at hand is which of two regulatory bodies, the Interstate Commerce Commission (I. C. C.) or the Civil Aeronautics Board (C. A. B.), has been given Congressional authority to regulate through-air bill motor vehicle transportation and by what method the exercise of such authority is to be reviewed.

Did Congress intend the C. A. B. to control this transportation or did it intend the I. C. C. to have the power, if and when it chose, to restrict rights *already granted* to air carriers by the C. A. B.?

This is the issue and the decision thereon will be national and affect an industry now consisting of 90 air forwarders with a total gross revenue of approximately $175 to $200 million per year.

Is this industry to be subjected to regulation by two Federal Agencies with no clear delineation as to which has final determinative power, or is it to be regulated by one agency with clear legislative criteria and a distinct review procedure available to all interested persons?

The former situation will produce uncertainty, excess costs, dual application, unsynchronized regulation and hesitancy of vital investment capital.

The latter will provide clear, concise and uniform regulation such as will encourage an ever-growing industry and promote the desired, adequate, economical and efficient service by air carriers, leading to the development of an air transportation system properly adapted for the future needs of United States commerce.

City of Phila. v. C. A. B., 289 F. 2d 770 (D. C. Cir. 1961) presents a perfect example of the havoc which would

be presented to the industry were these regulations to be effective. There the C. A. B. held a 90-mile truck movement from Newark, N. J. to Philadelphia, Pa. to be "air transportation" when performed under a through-bill from the Pacific coast. The circuit court sustained such holding.

Would it not have been chaotic to have had the Interstate Commerce Commission later determine, as it now could under the proposed rule, that this 90-mile truck haul was *not* air transportation and to have permitted the Commission to issue a cease and desist order no matter how much time, effort and money the air carrier had expended in developing this commerce from Philadelphia.

This appeal is to delineate agency authority over such through-bill joint air-motor transportation so that the expansion and development of air cargo may proceed under reasonable, uniform and clear criteria.

A. The Legislative Histories of Both the Federal Aviation Act and the Interstate Commerce Act Clearly Demonstrate the Intent of Congress to Place All Through-Bill Joint Air-Motor Transportation Exclusively Under the Economic Control of the Civil Aeronautics Board.

The *presence* of specific authority in the Federal Aviation Act and the *absence* of any such authority in the Interstate Commerce Act clearly shows Congress to have intended motor transportation used on through-air bills of lading to be placed under the economic control of the C. A. B.

Commencing with the Air Commerce Act of 1926 which defined Air Commerce as transportation "in whole *or in part* by aircraft of persons or property for hire" and continuing through the Civil Aeronautics Act of 1938 and its reenactment in the Federal Aviation Act of 1958, the plain meaning of the statutes and the express legislative history indicate that where this joint through air-motor transpor-

tation was concerned, its control was designed to be under the C. A. B.

The reasons for concluding this are:

(1) The Congressional legislative hearings prior to the enactment of the Civil Aeronautics Act of 1938 are replete with heated discussions as to whether jurisdiction over air transportation should be placed in the Interstate Commerce Commission or in the Civil Aeronautics Board as proposed by that bill. After much debate on this question the issue was resolved in favor of the C. A. B. which was given control of air transportation *as therein defined.*

(2) A 1941 report of the House Committee on Interstate and Foreign Commerce which dealt with Part IV of the Interstate Commerce Act covering surface freight forwarders stated:

> "Air forwarders and forwarding by air are now subject to the jurisdiction of the Civil Aeronautics Act of 1938 and the provisions of this definition and the other parts of the bill are written with a view to leaving that jurisdiction undisturbed and to avoid a duplication of regulation."

(3) The definition of interstate air transportation in both the 1938 and 1958 Acts states that it includes commerce moving "partly by aircraft and partly by other forms of transportation." The definition contains no specific limitation as to the other forms of transportation to be used.

(4) The C. A. B. was provided affirmative statutory duties under the Federal Aviation Act. In *Las Vegas Hacienda, Inc. v. C. A. B.*, 298 F. 2d 430, 438 (9th Cir. 1962), *cert. den.* 369 U. S. 885 (1962), the court pointed out that the legislative history emphasizes the importance attached by Congress to these duties which inter alia included "(1) the encouragement and development of an air transportation system; (2) the regulation of air transportation

so as to preserve its inherent advantages; and (3) the promotion of adequate, economic and efficient service by air carriers."

Appellant's position is further supported by the provisions of the Federal Aviation Act wherein the C. A. B. is given the authority to regulate the rates of the ground services provided. The Board has also issued regulations defining an air freight forwarder as an indirect air carrier which in the ordinary course undertakes to assemble and consolidate property "and is responsible for the transportation of property from the point of receipt to the point of destination."

The Civil Aeronautics Board has issued its own report and order (Regulation ER-407 of April 28, 1964) admittedly corollated to the report and order of the I. C. C. here appealed, in which the Board concludes the following:

1. Full development of air cargo transportation depends in large measure upon efficient surface transportation.

2. Effective customer oriented pick up and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder.

3. This control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder.

4. A reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pick up and delivery services and to test their adequacy and economy is vital to prevent the stifling of the potential of air cargo transportation.

Obviously if the C. A. B. cannot exclusively regulate all aspects of air transportation including the truck haul portion, it will be unable to cope with the problems of moving traffic between community and airport. Neither

could it properly test the carrier's adequacy and economy which it concludes is vital to the development of the air transportation system, which Congress has placed in the C. A. B. hands, 49 U. S. C. § 1302.

B. The Language of the Interstate Commerce Act Negates Any Economic Control by the I. C. C. Over Air Forwarders.

The Commission admits (p. 20a) that "there is no provision of the act conferring specific authority to determine what motor operations are within Section 203(b)(7a)." As was noted in the recent case of *J. B. Montgomery, Inc. v. U. S. and I. C. C.*, 206 F. Supp. 455, 461 (D. C. Colo. 1962), aff'd 376 U. S. 389 (1964), "The fact that Congress has expressed an intention that the act be administered to the end of developing and preserving an adequate, efficient and economical transportation system does not give to the Commission unlimited authority to proceed in any manner which the Commission believes will accomplish these objectives. *The Commission in accomplishing the objectives must proceed within the limit of its statutory authority,* and we find no such authority to impose the restrictions in question." (Emphasis added.)

(1) Section 203(b)(7a) of the I. C. C. Act Does Not Provide the Jurisdiction Claimed.

The Interstate Commerce Commission rests its authority to regulate the involved transportation primarily upon Section 203(b)(7a) of the I. C. C. Act even in the face of its plainly exclusionary language that "nothing in this part . . . shall be construed to include . . . the transportation of persons or property by motor vehicle when incidental to transportation by aircraft."

This section was placed in the Interstate Commerce Act by the Civil Aeronautics Act of 1938. That Act clearly delineated the control of joint through air-motor trans-

portation to be in the C. A. B. not only by the extensive overall plan envisaged by the Act but by its definition of C. A. B. regulated transportation as including that "partly by air and partly by other modes of transportation."

Throughout the history of Section 203(b)(7a) the I. C. C. and others have referred to it as an "exemption" whereas in fact it is an *exclusion*. This is not a mere question of semantics but is meaningful in determining Congressional intent. The term *nothing shall be construed to include* is truly exclusionary language whereas *exemption* implies a remainder after the portion which is exempt has been removed.

The I. C. C. Act never mentioned or referred to air transportation until the time of insertion of Section 203(b)(7a) in 1938. This section does not place any control in the I. C. C. but to the contrary the clear meaning of the section's language is that no part of the act is to be considered to create any such control.

The I. C. C. however, apparently takes the unique position that an exclusionary clause provides control over a portion of the excluded authority.

(2) The I. C. C. Definition of Interstate Commerce Clearly Eliminates Control Over Commerce Partly by Motor and Partly by Air.

The definition of interstate commerce as contained in Part II of the I. C. C. Act (49 U. S. C. § 303(a)(10)) limits the authority of the Commission to regulation only in connection with commerce which is transportated totally by motor vehicle or partly by motor vehicle and "partly by rail, express or water."

The citing of the specific modes of joint transportation clearly demonstrates the intent of Congress to restrict the authority of the I. C. C. to the regulation of only those three specific joint modes.

The Commission cannot create by interpretative fiat jurisdiction or authority not conferred by Congress.

A basic and long-enduring criterion of construction in the law has been "expressio unius est exclusio alterius" —an expression of one thing is the exclusion of another. This rule of construction has been given recognition innumerable times by this Court. See e.g., *Ford v. United States*, 273 U. S. 593 (1926) and *Continental Casualty Company v. United States*, 314 U. S. 527 (1941). See also *Interstate Commerce Commission v. Blue Diamond Projects Co.*, 192 F. 2d 43, 46 (8th Cir. 1951) and *Interstate Commerce Commission v. Agricultural Cooperative Association*, 34 F. R. D. 497, 498 (1946).

This conclusion is strengthened by the fact that at the time of the enactment of this definition there was in existence in the Air Commerce Act of 1926 a definition of *air commerce* as including transportation "in whole or in part by aircraft" without any limitation as to the other modes of the joint transportation.

The Commission cannot point to any specific definitive grant of power in support of its assumed authority to economically regulate air forwarders, but relies solely upon inference, implication and innuendo.

C. The C. A. B. and I. C. C. Have Collided.

In August, 1961, the C. A. B. published a Notice of Proposed Rule Making in which it proposed to extend to 50 miles the areas around airport cities in which air carriers and air freight forwarders could pick up and deliver property moving by air. The terminal areas for New York and Chicago were proposed to be extended considerably beyond 50-miles in recognition of the economic realities of air cargo distribution and collection at these, the greatest air cargo generating points in the nation. EDR-33, C. A. B. Docket No. 12951, August 23, 1961.

The I. C. C. truckers, which have always been hostile to the development and expansion of air cargo, struck at

this effort by the C. A. B. to bring air transportation pick up and delivery zones into conformity with the present realities of economic and industry development. The 25-mile zone was long out-moded and determination of terminal areas on an *ad hoc* basis for each of the several hundred certificated air points was, as the Board pointed out, "administratively unworkable."

The I. C. C. truckers petitioned the I. C. C., charged with fostering and protecting them, to institute a proceeding of its own which would narrowly define the "incidental to air" section 203(b)(7a) of the Motor Carrier Act and thus collide with, and hopefully counteract and contain the C. A. B.'s efforts to expand air freight service.

The move was successful. After informal discussions between the two agencies, the C. A. B., always ambivalent as to the extent of its power to define air freight terminal areas, capitulated completely to the I. C. C. The C. A. B. and I. C. C. contemporaneously published regulations under which the C. A. B. retreated to the 25-mile radius and provided for expansion only on an *ad hoc* individual-petition-basis, a procedure which the C. A. B. had itself previously pronounced "administratively unworkable."

Air freight is thus locked in a straight-jacket and the I. C. C. has possession of the key. The C. A. B. has acquiesced in the arrangement, styled with false euphemism as a reasonable accommodation of the duties of the two agencies under their respective statutes, but more properly, a total surrender to the I. C. C. of the C. A. B.'s statutory duty.

The C. A. B. has thus purported to stand aside and let violence be done to the manifest Congressional intent that the older forms of transportation and their regulatory body, the I. C. C., should not be permitted to narrowly limit the scope of ground services as a part of air transportation and thereby retard the proper growth of air transportation.

The Court below misunderstood the significance of what had happened. It found that "no conflict between the Board and the Commission has arisen." There is no "conflict" now because the C. A. B., after informal discussion, has illegally abdicated its legislative directive. Nor will there be any conflict in the future under this arrangement because the C. A. B. has renounced its original determination to bring air freight terminal area definitions into conformity with the needs of contemporary air shippers and has retreated to the 25-mile rule of thumb in existence since before World War II—and even there it concedes it is so doing only by grace of and under grant from the I. C. C. It will make *ad hoc* extensions under a conservative policy, since it knows the I. C. C. will over-ride any liberalization, as the I. C. C. has indeed already vetoed the 50-mile extension.

D. The Federal Aviation Act Provides Adequate Redress of Grievances for All if Suffered by C. A. B. Action.

Even if the I. C. C. or others believe that it will adversely affect industry if the I. C. C. lacks the authority to impose restrictions on the transportation here in question, this is a matter for consideration by the Congress and is not justification for the Commission or Courts to write into Congressional legislation something which is neither evident from the Acts nor from the legislative histories.

The obvious forum to determine the legality of the C. A. B. authority under which an air carrier is operating is, prima facie, the C. A. B.

As the Ninth Circuit said in the *20th Century Delivery Service v. St. Paul's Fire & Marine Ins. Co.*, 242 F. 2d 292 (9th Cir. 1957) at page 302, "under these provisions [C. A. B. Act] and similar provisions of other enactments, it is well settled that questions of the reasonableness of rates and practices are to be left to the administrative agency in the first instance, and that under this doctrine of

'primary jurisdiction' the provisions of the tariff properly filed with the Board and within its authority are deemed authority until rejected by *it*." (Emphasis added.)

It is to be assumed that the C. A. B. will carry out its legislative mandate and that it will interpret its authority correctly. If, however, it does not, recourse to all parties is available in the Federal Courts (49 U. S. C. § 1486(a)).

Certainly, it is not within the power of the I. C. C. to censor, overrule, or limit the legitimate exercise of legislatively delegated power by the C. A. B.

E. The Opinion of the Lower Court Should Not Remain Determinative, as It Is Based Upon a Misunderstanding of the Problem and Inconsistent Holdings.

In Judge Davis' opinion during the introductory discussion, the court states as a holding (p. 2a):

> "This service by motor carrier is exempt from economic regulation by the I. C. C. where the collection or delivery is a part of the continuous movement of goods in air transportation *on a through bill of lading* issued by the direct air carrier or the air freight forwarder." (Emphasis added.)

If this is true, as appellants herein believe it to be, the I. C. C. does not have the power to regulate the through-bill joint air motor transportation here involved. However, in the proposed regulations the Commission has reserved control in the very situation Judge Davis states to be exempt.

The court in reaching its ultimate decision makes the following points, neither of which is logically valid.

The first is a rebuttal to the argument presented by the appellants that the Congressional definitions of *interstate commerce* and *air transportation* are definitive in the case.

In striking down this argument the court states only (p. 4a):

> "It cannot conceivably be argued, and the plaintiffs have not attempted to do so, that where railroads or buses are used in connection with air transportation the Board would have the jurisdiction to regulate this movement of property."

Joint bus-aircraft transportation and joint air-rail transportation were of course not in the case and therefore not mentioned. However, because the appellants did not make these arguments, the court apparently concludes that the argument made must necessarily fall.

For the lower court to dispose of a legitimat argument on the grounds that two other inapplicable arguments were not made and could not be made is illogical, meaningless and no answer.

The court also disposes of appellant's argument that under Section 403(a) of the Federal Aviation Act the Board has been given regulation over motor vehicles involved in pick up and delivery service in connection with air transportation. The Court correctly recites that this section requires *air carriers* to include in tariffs submitted to C. A. B. the charge for such pick up and delivery service.

The court thereafter states (p. 4a) that "to construe this language as jurisdiction to economically regulate the motor carriers performing the service is to strain the plain meaning of the Section."

The District Court fails to realize that the term "air carriers" as used in Section 403(a) includes air forwarders which can perform forwarding services only by use of motor vehicles and many of which operate their own motor vehicles. Since the section requires the tariffs for such pick up and delivery service to be approved by C. A. B. and, lacking such approval, the tariffs are considered illegal, it cannot reasonably be said that such C. A. B. control is not economic.

The Court ultimately holds (p. 6a) that the I. C. C. has the jurisdiction to define the scope of the exemption granted in Section 203(b)(7a), stating that this determination is dispositive of the litigation.

However, the issue presented to the lower court was not whether the I. C. C. had jurisdiction *to define* the scope of 203(b)(7a) but, rather, did it define the scope *properly* by asserting jurisdiction over transportation already subject to the Civil Aeronautics Board.

The issues raised in this appeal are also now pending determination in at least two other federal districts where complaints have been filed against the Interstate Commerce Commission. These cases are *Zantop Air Transport Inc. v. United States* in the Eastern District of Michigan and *Wyckoff Company Inc. v. United States,* District of Utah. These courts will be confronted with the very same decision as confronted the lower court in this appeal. It is important that this issue be determined on a national basis.

The opinion of the lower court therefore should not stand as being determinative of the issue involved since it did not resolve that issue. Indeed, in the body of its opinion (p. 2a) the court stated the law *to be as the appellants herein contend:*

> "Service by motor carrier is exempt from economic regulation by the I. C. C. where the collection or delivery is a part of the continuous movement of goods in air transportation on a through bill of lading issued by the direct air carrier or the air freight forwarder."

F. This Court Should, as It Has in the Past, Resolve the Important Question of Agency Jurisdiction.

The I. C. C. and C. A. B. represent that they have resolved the conflict in their jurisdictions. This was not a resolution but a renunciation by the C. A. B. to the I. C. C.

that it should not have made and is not authorized by law to make. This Court has been called upon to review similar action by the C. A. B. in the past. Plenary consideration with briefs on the merits and oral argument, is required here to resolve this substantial question of which agency should interpret the meaning and scope of "air transportation."

In *Pan American Airways v. U. S.*, 371 U. S. 296 (1963), this Court was called upon and did grant plenary consideration to the C. A. B.'s abdication of responsibility to decide antitrust issues. In that case, the abdication was to the courts. In this case it is to the I. C. C. The cases, however, are indistinguishable in principle.

In the *Pan American* case this Court analyzed the Civil Aeronautics Act and its purpose and concluded that it would be "strange indeed" and "odd" to conclude that divisions of territories, allocations of routes or affiliations between carriers which met the requirements of "public interest" should run afoul of the antitrust laws. This Court held that this determination "is peculiarly a question for the Board, subject, of course, to judicial review." 371 U. S. at 309. The controlling consideration which this Court pointed out was that,

> "the particular relation of this problem to the general process of encouraging development of new fields of air transportation makes it all the more appropriate that the Board should decide." 371 U. S. at 311

These same considerations apply with at least as compelling force to the instant case. Only if this Court acts to free the C. A. B. of the I. C. C.'s dead hand, will the C. A. B. be able to carry out its statutory responsibility of "encouraging development of new fields of air transportation."

The C. A. B. is the single repository of "all of the existing functions of the Federal Government with respect to Civil Aeronautics." 371 U. S. at 304.

The C. A. B. must be directed by this Court to carry out its duty. The way it carries it out will, of course, be subject to judicial review. But it cannot legally in the first instance surrender to I. C. C. the decision which is the C. A. B.'s alone.

CONCLUSION.

For the foregoing reasons the questions presented by this appeal are substantial and of nation-wide importance. In view of the federal agency conflict involved and the wide application of the Commission's regulations upon air forwarders, the Court should exercise its jurisdiction to correct the judgment below.

Respectfully submitted,

ARTHUR R. LITTLETON,
HAROLD S. SHERTZ,
LOUIS P. HAFFER,
ROBERT M. BECKMAN,
Attorneys for Appellants.

Of Counsel:

MORGAN, LEWIS & BOCKIUS.

Dated: March 19, 1965

Appendix.

OPINION.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 36000.

AIR DISPATCH, INC.

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

December 22, 1964.

DAVIS, *J.*

This action was instituted by the filing of a complaint to set aside the report, order and regulations adopted by the Interstate Commerce Commission (Commission or I. C. C.) on May 4, 1964 in No. MC-C-3437, *Motor Transportation of Property Incidental to Transportation by Aircraft.* A statutory three-judge court was impaneled pursuant to Title 28, U. S. Code, Sections 2284 and 2321-2325 (28 U. S. C. A. 2284, 2321-25). On June 23, 1964, after hearing, the Court entered a temporary restraining order setting aside the Commission's order until a final decision by the Court. Briefs were submitted by the parties and numerous interested parties which participated in the Com-

mission's rule making proceedings have been granted leave to intervene. Oral argument was held on November 9, 1964 and decision was reserved.

Air Dispatch, Inc. and intervenor-plaintiffs (hereinafter referred to collectively as plaintiffs) attack the Commission's statutory authority to promulgate the regulations here involved on the ground that the Commission lacks the jurisdiction to determine when motor carrier transportation is a part of air transportation. Plaintiffs assert that the Civil Aeronautics Board (C. A. B. or Board) is the exclusive arbiter of this question by virtue of sections 101 (20) and (21), 102, 403(a), 404 and 412(a) of the Federal Aviation Act of 1958.

Plaintiffs are air freight forwarders, or indirect air carriers, and are engaged in the collection, delivery or transfer of shipments which have been received from, or will be delivered to, an airline or direct air carrier. The service rendered by the plaintiffs at either or both ends of the line-haul movement of goods by the airline is an integral and necessary part of the fast and efficient service available to shippers using air transportation.

This service by motor carrier is exempt from economic regulation by the I. C. C. where the collection or delivery is a part of the continuous movement of goods in air transportation on a through bill of lading issued by the direct air carrier or the air freight forwarder. This exemption[1] is set out in Section 203(b)(7a) of the Interstate Commerce Act which reads in part as follows:

> "Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include . . . the transportation of persons or property when incidental to transportation by aircraft. . . ."

---

1. Plaintiffs prefer to label this an exclusion but for purposes of this opinion the semantic battle is resolved in favor of exemption.

This section was inserted in the Interstate Commerce Act by section 1107(j) of the Civil Aeronautics Act of 1938.[2] The scope of this exemption had initially been discussed in several I. C. C. cases[3] and was fully examined in *Kenny Extension-Air Freight*, 49 M. C. C. 182 (1949), 61 M. C. C. 587 (1953). This decision established the exemption to encompass the motor carrier transportation of property in the collection, delivery or transfer of shipments when made in connection with a prior or subsequent line-haul movement by an air carrier, as a part of a continuous movement under a through bill-of-lading. The through bill-of-lading covers the line-haul movement by the direct air carrier and the collection, delivery or transfer service by motor carrier rendered by the indirect air carrier. The *Kenny* decision also held that such motor carrier service must be performed within the terminal area of the air carrier filed with the C. A. B.[4] It is the position of the defendant that certain of the regulations here under attack are merely a codification of the foregoing *Kenny* doctrine.

Since the I. C. C. in the *Kenny* case assumed that the terminal areas approved by the C. A. B. would be reasonable, and therefore acceptable to the I. C. C., the plaintiffs maintain that the present regulations overrule the *Kenny* decision. The plaintiffs point out that a determination by the C. A. B. as to a reasonable terminal area may be completely overruled by the I. C. C. if it determines that such motor transportation is not incidental to air transporta-

2. The issue arose at oral argument whether section 203(b)(7a) of the I. C. C. Act was repealed when the Civil Aeronautics Act was replaced by the Federal Aviation Act of 1958. The determination of this question is not necessary for the disposition of this action and will therefore not be decided at this time.

3. See *Sky Freight Delivery Service, Inc., Com. Car. Application*, 47 M. C. C. 229; *Teterboro Motor Transp., Inc. Com. Car. Application*, 47 M. C. C. 247; *Graff Common Carrier Application*, 48 M. C. C. 310.

4. The *Kenny* doctrine now covers the terminal area filed by the indirect air carriers (plaintiffs). *Panther Cartage Co. Extension-Air Freight*, 88 M. C. C. 37 (1961).

tion.[5] This argument resolves itself into the question of who will decide the reasonableness of any given terminal area?

Jurisdiction to regulate air transportation is lodged in the C. A. B. and air transportation is defined as "transportation partly by aircraft and partly by other forms of transportation.". 49 U. S. C. A. 1301 (21). Interstate Commerce is defined to include commerce between states whether such commerce moves "wholly by motor vehicles or partly by motor vehicles and partly by rail, express or water."[6] 49 U. S. C. A. 303 (10). It follows, the plaintiffs argue, that the Commission was to regulate motor vehicle transportation in connection with transportation by means other than aircraft and the Board was to regulate all forms of transportation used in connection with transportation by aircraft. It cannot conceivably be argued, and the plaintiffs have not attempted to do so, that where railroads or buses are used in connection with air transportation the Board would have the jurisdiction to regulate this movement of property.

The plaintiffs attempt to construe Section 403(a) of the F. A. A. as a grant to the Board of jurisdiction over motor vehicles involved in pick-up and delivery service ". . . in connection with . . . air transportation." This section requires the air carriers to include in their tariffs filed with the C. A. B. the charge for such pick-up and delivery service. To construe this as jurisdiction to economically regulate the motor carriers performing this service is to strain the plain meaning of the section beyond its limit.

It cannot be argued that the Commission lacks jurisdiction to regulate all common carriers (motor vehicles)

5. This possible conflict could be avoided through the use of a Joint Board as provided in Section 1003 of the Federal Aviation Act, 49 U. S. C. A. 1483.

6. It was suggested at oral argument that the "express" mentioned in the definition of Interstate Commerce was "air express" as known in 1935.

involved in the movement of goods in interstate commerce to the extent that the issue involved pertains to (1) the qualifications of employees of the common carriers, (2) the maximum hours of work by employees, (3) the safety regulations to be followed by the carriers, or (4) the equipment standards to be met by the carriers. The Commission also has authority to economically regulate all motor vehicles involved in interstate commerce except when the motor vehicles are used exclusively in the collection, delivery or transfer of goods incidental to transportation by aircraft. Excluding this partial exemption of Section 203. (b)(7a), the Commission has regulatory authority over all motor vehicles in interstate commerce. The determination of the scope of this exemption from economic regulation must logically fall on the Commission. Whether this determination is accomplished on an ad hoc basis as in *Kenny* and the cases following that decision, or by use of the rule making power does not alter the right to make such a determination.

The plaintiffs cite *City of Philadelphia v. C. A. B.*, 289 F. 2d 770 (D. C. Cir. 1961), which held that the motor vehicle transportation of air cargo from Newark to Philadelphia, subsequent to an air movement of the same cargo from California to Newark, was "air transportation" within the meaning of the Federal Aviation Act. This case decided only that the airline involved, Flying Tiger, was fulfilling its obligation to Philadelphia in providing it with adequate air transportation between Philadelphia and California as called for by the certificate of public convenience and necessity issued to Flying Tiger by the C. A. B. The Court did not decide that the Board had economic regulatory jurisdiction over the Newark-Philadelphia truck run nor that such motor vehicle transportation of air cargo was incidental to transportation by aircraft and therefore exempt under Section 203(b)(7a). The Court, by way of dictum, cited with approval the Board's Order disclaiming jurisdiction and indicating the Commis-

sion should determine if the Newark-Philadelphia truck haul is incidental and exempt. We agree. An interline movement of property partly by air and partly by motor vehicle may be air transportation for purposes of providing service to points for which a certificate of public convenience and necessity has been issued and at the same time the motor vehicle portion would not be incidental to the transportation of the property by aircraft.

We find that the I. C. C. has the jurisdiction to define the scope of the exemption granted in Section 203(b)(7a). This determination is dispositive of this litigation since inquiry into the substance of the regulations would be premature. No conflict between the Board and the Commission has arisen nor have these regulations been attacked as an unreasonable exercise of the authority vested in the Commission.

An appropriate order may be submitted by the defendant, Interstate Commerce Commission.

By THE COURT:

JOHN MORGAN DAVIS, *J.*

REPORT OF THE COMMISSION.

Served May 8, 1964

M-11045

INTERSTATE COMMERCE COMMISSION

No. MC-C-3437

MOTOR TRANSPORTATION OF PROPERTY INCIDENTAL TO TRANSPORTATION BY AIRCRAFT

Decided May 4, 1964

Upon notice of proposed rulemaking, regulations adopted prescribing—

1. The circumstances under which motor transportation of property, in interstate or foreign commerce, is transportation incidental to transportation by aircraft within the partial exemption of section 203(b)(7a) of the Interstate Commerce Act.

2. The manner in which air freight forwarders (indirect air carriers) holding authority from the Civil Aeronautics Board may participate in intermodal air-motor transportation in which the motor movement is not within the scope of section 203(b)(7a).

Peter T. Beardsley, F. G. Freund, Bryce Reed, Jr., and *Richard R. Sigmon* for petitioners.

Robert C. Londerholm for the State Corporation Commission of Kansas.

Tyre W. Burton, E. L. McClintock, William Barton, Frank J. Iuen, and *Frank W. May* for the Missouri Public Service Commission.

J. Raymond Clark for the Port of New York Authority.

Frank Kesler for the Oklahoma City (Okla.) Chamber of Commerce.

Paul A. Smith, Max W. Young, Robert C. Dryden, Harry Pohlad, Hugh T. Matthews, M. M. Emery, J. E. Hall, Louis P. Haffer, Harry F. Gillis, C. C. Boyd, August W. Koehler, P. J. Campbell, Joe G. Fender, James J. McNulty, Russell S. Bernhard, Harold S. Shertz, R. E. Fitzgerald, Mert Starnes, Richard A. Stuart, Robert DeKroyft, Drew L. Carraway, John S. Fessenden, Frederick S. Hill, James D. Mann, Robert J. Corber, R. K. Fillingame, Harry D. Pugsley, Albert F. Beitel, G. H. Dilla, and *Edward H. Pollaci, Jr.*, for themselves, motor carriers, air carriers, or other interested persons.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This rulemaking proceeding, instituted October 4, 1961, by division 1 on its own motion, brings before us for determination the circumstances under which, and the areas within which, motor transportation of property, in interstate or foreign commerce, is transportation incidental to transportation by aircraft, and therefore exempt from the economic regulation of this Commission by the terms of section 203(b)(7a) of the Interstate Commerce Act. Our order instituting this proceeding followed closely upon the institution on August 26, 1961, by the Civil Aeronautics Board (C. A. B.) of a proceeding in its Economic Regulation Docket No. 12951, 26 F. R. 8037, looking toward establishment of the limits of zones within which air cargo pickup and delivery services may be provided by air carriers pursuant to appropriate tariffs filed with that agency under the Federal Aviation Act. That proceeding originally contemplated expansion of air terminal areas to include points within 50 miles of the principal cities served by a

given airport. It was terminated by the adoption by the C. A. B., on April 28, 1964, of the regulations contained in appendix II hereto.

Also considered in instituting the instant proceeding was a joint petition filed September 25, 1961, by the 5 trade associations, including the American Trucking Associations, Inc. (ATA), and the 40 motor carriers named in appendix I hereto. Excluded from this proceeding is the transportation of passengers when incidental to transportation by aircraft, which is the subject of another similar proceeding.[1]

On October 17, 1963, we issued a supplemental notice of proposed rulemaking reopening the proceeding and expanding its scope so as to define the appropriate role of air freight forwarders (indirect air carriers) in intermodal air-motor transportation. It was pointed out that information acquired during the course of Commission and staff level meetings with C. A. B. personnel, as well as from representations previously filed herein, indicated that there were substantial barriers against effective air forwarder participation in the considered intermodal carriage. This situation was described as being at least partially attributable to our holding in *Panther Cartage Co. Extension—Air Freight,* 88 M. C. C. 37, and the supplemental notice proposed to eliminate the distinctions made in that decision between shipments moving on the billing of air freight forwarders holding authority from the C. A. B. and those moving on the billing of direct air carriers. It also contained proposed rules which would have allowed an air freight forwarder, subject to certain conditions, to receive from or deliver to an authorized motor common carrier consignments moving from or to points beyond the territorial scope of the incidental-to-air exemption without being considered as being a surface freight forwarder subject to part IV of the Interstate Commerce Act. These

1. No. MC-C-4000, Motor Transportation of Passengers Incidental to Transportation by Aircraft.

proposed rules are essentially the same as those being adopted herein and contained in part B of appendix III.

The order instituting this proceeding and the supplemental notice both provided for participation by motor and air carriers, or any other interested persons,[2] through the submission of written statements of facts, views, and arguments, all of which have been considered. They further stated that such representations would be a part of the record herein, and that no hearings would be scheduled for the receiving of oral testimony unless a need therefor should later appear. The Film Carriers Conference of the ATA, Air Dispatch, Inc., and the National Film Carriers, Inc., in their joint statement, contend that insufficient facts upon which to predicate any regulations are presented, but these parties have not requested oral hearing. Requests for such a hearing are embraced in the responses of the State Corporation Commission of Kansas and Direct Airport Service, Inc., to the supplemental notice. In our opinion, and after examination of the numerous submitted statements, we conclude that an oral hearing is unnecessary.

Historical Background

Section 203(b)(7a) was made part of the Interstate Commerce Act by section 1107(j), under the "Amendments and Repeals" provisions, of the Civil Aeronautics Act of 1938. It provides that "Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include * * * the transportation of persons or property when incidental to transportation by aircraft * * *." A review of the legislative history of that section sheds little light on the limits or extent of the partial exemption provided by section 203(b)(7a). See *Sky Freight Delivery Service, Inc., Com. Car. Application,* 47 M. C. C. 229; and *Hatom Corp. Common Carrier Application,* 91 M. C. C. 725,

2. Appendix I contains a list of the persons filing representations.

which contains a discussion of the section 203(b)(7a) exemption insofar as it relates to the transportation of passengers.

The early decisions of this Commission in which a prior or subsequent movement of property by air was involved,[3] portation of property unless otherwise specified.
do not discuss the scope of the partial exemption in any great detail.[4] With respect to certain applications of the Railway Express Agency, the reports merely concluded that the transportation of air express shipments by motor vehicle was not within the exemption, holding that the service involved a line-haul operation.[5]

The first extended discussions of the meaning of the section 203(b)(7a) exemption did not appear until 1947 when the *Sky Freight* case, *supra,* dealing with the transportation of property, and *Teterboro Motor Transp., Inc., Com. Car. Application,* 47 M. C. C. 247, dealing with the transportation of passengers, were decided. In these two cases, decided on the same date, it was found that transportation, whether of passengers or property, must involve traffic having an immediately prior or subsequent movement by air; that the length of the motor movement is not the sole determining factor particularly in the New York metropolitan area; and that, because of the differing circumstances present at various airports, no definite territorial limit to the exemption could be prescribed.

In the *Sky Freight* case it was held that it is that transportation rendered in the performance of collection, de-

3. All cases hereinafter discussed or cited concerned the trans-

4. *Port Columbus Cab Co. Contract Carrier Application,* 24 M. C. C. 237; *Railway Exp. Agency, Inc., Ext.—West Unity—Middletown,* 31 M. C. C. 363, 366; and *Railway Exp. Agency, Inc., Ext.—Clarksburg—Buckhannon,* 31 M. C. C. 700, 702. The latter two cases merely refer to the *West Warwick* case, cited in footnote 5, in finding the operations there in question were not within the partial exemption of section 203(b)(7a).

5. *Railway Exp. Agency, Inc., Extension—West Warwick, R. I.,* 31 M. C. C. 332, 335 (12 miles); and *Railway Exp. Agency, Inc., Extension—Bristol, R. I.,* 31 M. C. C. 388, 390 (15 miles).

livery, or interline transfer of airfreight within what is a reasonable terminal area for the line-haul air carrier which is "incidental" to the transportation by air. However, it was stressed there that when a particular motor service takes on the character of a connecting-carrier line-haul service and becomes a part of what is essentially a through interline service by connecting carriers of independent status, it cannot any longer be said to be subordinate to, an adjunct of, or "incidental" to any prior or subsequent transportation by aircraft.

In *Golembiewski Common Carrier Application,* 48 M. C. C. 1, 5, division 5, in following the *Sky Freight* decision, concluded:

> We repeat, however, our admonition in that case, that such considerations as door-to-door rates and air-carrier b[illegible]ing and responsibility are not necessarily controlling and would not require a finding of an exempt operation should it appear that the motor-carrier service involved was so extensive as to constitute, in fact, a line-haul part of a through interline service, rather than a bona fide collection or delivery service incidental to air-carrier service.

This admonition in *Golembiewski* was repeated in *Peoples Exp. Co. Extension of Operation—Air Freight,* 48 M. C. C. 393. In that case, a portion of the service proposed was substantially similar to that with which the *Sky Freight* and *Golembiewski* cases,[6] were concerned. In addition, applicant therein contemplated a more extensive service from and to the Newark Airport, with some of the points to be served being over 100 miles from the airport. It was held that the service proposed for the northern portion of New Jersey, particularly in the immediate vicinity of New York City, came within the scope of the exemption and was bona fide transportation "incidental to transpor-

6. These cases, as well as the *Peoples Exp. Co.* case, involve transportation in the vicinity of New York City.

tation by aircraft," but that the service proposed for southern New Jersey was not. Division 5 stated, 48 M. C. C. at 396:

> Motor operations conducted as those proposed, which extend so far as to reach into the territory adjacent to, and served primarily by, another airport clearly take on the character of interterminal line-haul service *in substitution for, rather than incidental to, air transportation.* [Emphasis added.]

Noting the particular problems involved therein, division 5 concluded that, as a public need existed for the proposed service, it was unnecessary for it to determine to what extent the proposed operations were beyond the scope of the exemption. An exception to the above-quoted conclusion in *Peoples Exp. Co.* was recognized when the traffic in question was emergency in character. *Graff Common Carrier Application,* 48 M. C. C. 310.[7]

Section 203(b)(7a) was thoroughly examined in *Kenny Extension—Air Freight,* 49 M. C. C. 182 (1949), 61 M. C. C. 587 (1953). In the first *Kenny* report, it was found that the applicant's proposed operations in the transportation of commodities moving on commercial air-line or air express bills of lading and having an immediately prior or immediately subsequent movement by aircraft between Allegheny County Municipal Airport and the Greater Pittsburgh Airport, located in Allegheny County, Pa., on the one hand, and, on the other, points in Pennsylvania within 50 miles of either of such airports, is transportation by aircraft within the partial exemption provided by section 203(b)(7a) and as such would be exempt from the certificate or permit requirements of part II of the act; and that

---

7. This proceeding involved the transportation of passengers and their baggage, but the principles enunciated there with respect to the emergency movement by substituted motor-for-air service have been followed in numerous proceedings involving the transportation of property having a prior or subsequent movement by air.

the application should be dismissed. No one opposed the application at the initial hearing. Upon consideration of a petition for reconsideration and further hearing filed by ATA, the proceedings were reopened for further hearing, and numerous parties [8] were permitted to participate as interveners at the further hearing. In its report on further hearing, division 5 considered the national as well as the local application of the partial exemption, and, in particular, the possibility of inter-agency conflict. Some of the parties of record in the instant proceeding were parties of record in the *Kenny* proceeding, and they advanced there arguments similar to the ones here presented.

Division 5 in the second *Kenny* report [9] found that motor transportation of property to come within the 203 (b)(7a) partial exemption must be confined to transportation, in bona fide collection, delivery, or transfer service, of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous movement under a through bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier. The decision therein clearly distinguishes between motor transportation on behalf of an air carrier within the air carrier's terminal area, on the one hand, and, on the other, transportation which, although essentially part of a through air-motor service extends beyond the air carrier's terminal area and must be considered to be a line-haul motor service of an independent motor carrier. It was determined that the former was within the exemption of section 203(b)(7a) while the latter was not.

It was recognized in the *Kenny* case, that a reasonable terminal area for an air carrier at particular points may be different from that of a land carrier, and the report indi-

8. ATA, Local Cartage National Conference, Air Cargo, Inc., and various rail and motor carriers.

9. All later references to the *Kenny* case concern the report on further hearing, 61 M. C. C. 587.

cated that the terminal areas established by the air carriers in tariffs filed with the C. A. B. would ordinarily be acceptable.[10] The division stated, 61 M. C. C. at 596:

> In addition, this interpretation is sufficiently flexible to adapt itself to any future reasonable enlargement or curtailment of air terminal areas by the air carriers themselves which may be accomplished, and properly so, by changes in the present so-called terminal area tariffs of these air carriers on file with the C. A. B. The air carriers now establish their terminal area limits by filing of tariffs with the C. A. B., and *our interpretation of the exemption of section 203(b)(7a) is based on the assumption that that agency would not hesitate to reject any publication which would result in an unreasonable enlargement of such an area.* [Emphasis added.]

Prior decisions, except those involving the Railway Express Agency, were overruled to the extent that they were inconsistent with the decision in the *Kenny* case.

The *Kenny* doctrine has been applied uniformly since that decision. Applications have been dismissed in instances involving motor carrier service performed under through airline bills of lading pursuant to a contract with an airline and within the published terminal area of the airline;[11] or the *Kenny* case has been distinguished where the proposed operations were not to be performed under a through bill of lading or involved movements beyond the

---

10. At the time the *Kenny* case was decided, the C. A. B. ordinarily used as a rule of thumb for determining the reasonableness of airline terminal areas a radius of 25 miles from the cities served by the air carrier filing with it tariffs offering terminal services. Except for major air traffic points such as New York and Chicago, it has continued to limit air carrier terminal areas to such a 25-mile radius.

11. *Commodity Haulage Corp. Common Carrier Application*, 69 M. C. C. 527, and *Scari Extension—Airports*, 76 M. C. C. 319, 323.

limits of the airline terminal area, thus requiring operating authority from this Commission.[12]

In *Panther Cartage Co. Extension—Air Freight*, 88 M. C. C. 37 (decided October 4, 1961), we confirmed the doctrine of the *Kenny* case and extended it to cover air freight forwarders, which are defined and classified as indirect air carriers.[13] We found there that where an indirect air carrier handles the line-haul air transportation, the proposed motor transportation of property in order to come within 203(b)(7a) exemption must be confined to the transportation, in bona fide collection, delivery, or transfer service, of shipments which have been received from, or will be delivered to, an air carrier as a part of a continuous movement under a through air freight forwarder bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier. It was also held that where the involved shipments move under the bill of lading of an air freight forwarder, the collection, delivery, or transfer service must be confined to such points named in the indirect air carrier's terminal area tariffs as are within the terminal area tariff of the direct air carrier actually performing the air portion of the line-haul movement.[14]

We have always considered in a different light emergency motor transportation performed as a substitute for transportation by air. It was found in the *Graff* case, *supra*, that the transportation of passengers performed sporadically, in emergency situations arising from the inability

12. *Gromand Common Carrier Application*, 72 M. C. C. 257; *Southern Pacific Transport Co.—Air Freight*, 73 M. C. C. 345, 346; *Fischer Common Carrier Application*, 83 M. C. C. 229; and *Scari*, cited in footnote 11. In the *Scari* case, division 1 held that Philadelphia, Pa., and Wilmington, Del., (each served by its own airport) were not within the same terminal area, and therefore the transportation proposed therein was not within the partial exemption of section 203(b)(7a).

13. *Air Freight Case*, 9 C. A. B. 473, and 14 CFR 296.2(a).

14. Our conclusions in the instant proceeding, as will be noted later herein, differ in certain respects from those of the *Panther* case.

of the air carrier to provide air service due to adverse weather conditions, equipment failure, or the like, was incidental to transportation by aircraft, even though the operations might be conducted between airports as much as 200 miles apart. Division 5 made the following comment on this type of operation, 48 M. C. C. at 315-16:

> Clearly, the operations here involved are interterminal and intercity line-haul operations but they are unusual and different from ordinary connecting-carrier line-haul operations in certain respects. Connecting-carrier line-haul motor operations are complementary to air-transportation services with which they connect and are conducted regularly as a part of through interline service. In contrast the operations here involved, though line-haul, are sporadic and irregular in point of time and emergency in character. They are furnished at the airline's expense and serve as a substitute for impossible or impracticable air transporation and not as a complement to regular air service. They are clearly subordinate to the regular air service; a necessary result or adjunct of it, without which, or its equivalent in some form, maintenance of regular air service would be more hazardous if not wholly impracticable on many occasions.

In applications decided since the *Graff* case [15] the Commission has consistently applied the doctrine of that case without modification. As recently as the *Panther* decision, *supra*, the *Graff* holding was reaffirmed, and that portion of the *Panther* application for authority to perform operations which are emergency in character was dismissed as being within the partial exemption of section 203(b)(7a) of the act.

---

15. See *Michaud Common Carrier Application*, 73 M. C. C. 677, and *Fischer Common Carrier Application, supra*. Although *Graff* was not cited in the *Fischer* decision, the rule first applied in *Graff* was stated at 83 M. C. C. 234 as controlling when adverse weather conditions prohibit air service between Galion and Cleveland, Ohio.

Also pertinent to the issues here before us is the decision of the Court of Appeals for the District of Columbia in *City of Philadelphia v. Civil Aeronautics Board,* 289 F. 2d 770, hereinafter called the *Flying Tiger* case, in which the court upheld a decision of the C. A. B. which had found that a proposed operation of Flying Tiger Air Line would as to the airline itself constitute air service at Philadelphia in spite of the fact that it did not intend to utilize the Philadelphia airport but, instead, to serve that city through the use of motor service from the Newark, N. J., airport, about 90 miles away. Although the petitioner, City of Philadelphia, had expressly agreed at a prehearing conference that the case should proceed on the basis that the airline was conducting its trucking operation (between Philadelphia and the Newark Airport) under lawful authority, it raised the issue on appeal that the motor carrier portion of the proposed operation did not qualify as partially exempt under section 203(b)(7a) of the Interstate Commerce Act. Assuming without deciding whether such a question could be raised in view of the agreement at the prehearing conference, the court thought that the C. A. B. adequately and correctly disposed of it in its order when it said:

> Philadelphia makes the subsidiary argument that the Philadelphia-Newark truck haul is subject to the jurisdiction of the Interstate Commerce Commission. Our finding goes no further than that Flying Tiger Lines' proposed service will, as to it, constitute air transportation and that in rendering service to the airports proposed Flying Tiger Lines will be fulfilling its obligations under its certificate. We are not asserting jurisdiction over the motor carrier as an air carrier nor are we determining the status of the truck operation under the Interstate Commerce Act. Whether the Philadelphia-Newark truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Act, and thereby exempt from economic regulation of that statute, is a matter

for the Interstate Commerce Commission. We do not intend that our action here should influence what that decision should be. If the Commission should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have and obtain the requisite I. C. C. authority in order for Flying Tiger Lines to operate in the manner it proposes.

JURISDICTION

Certain parties, including the direct air carriers, air freight forwarders, and unregulated motor carriers specializing in gound movements of airfreight, contend that this Commission is without jurisdiction to enter an order or rule defining generally motor transportation "incidental to transportation by aircraft" as set forth in section 203(b)(7a) of the act, or to prescribe by regulation limits to the areas in which the exemption applies. They argue (1) that this section is a positive and self-defining legislative directive, imposed by section 1107(j) of the Civil Aeronautics Act of 1938, to protect the jurisdiction of the C. A. B. in the regulation of transportation by air, (2) that any limiting interpretation which we may place upon the partial exemption might serve to thwart the C. A. B. in carrying out its congressional directive to develop airfreight service, and that at any rate, the C. A. B. could defeat such action by this Commission merely by amending the airlines' certificates in order to permit service at points found by us to be beyond the scope of the exemption, (3) that the instant proceeding creates a direct conflict with the C. A. B.'s pending rulemaking proceeding, (4) that the intent of Congress as expressed in the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958, and most particularly in sections 101(20) and (21), 102, 403(a), 404 and 412(a) of the latter was to place in the C. A. B. sole jurisdiction to regulate air transportation and surface transportation performed in connection therewith, and (5) that the

congressional intent, as it is interpreted by these parties, is fully justified, as is evidenced by the C. A. B.'s action in the *Flying Tiger* decision, *supra,* which would be nullified were this Commission to assume jurisdiction over the motor operation between Philadelphia and Newark and deny to the airline the right to provide such service without motor carrier operating authority. The Air Freight Forwarders Association contends that in view of the fact that section 203(b)(7a) of the act was enacted as a part of the Civil Aeronautics Act, there must be implied therein the phrase "as defined in the Civil Aeronautics Act" similar to the explicit limitation contained in the 203(b)(5) partial exemption which refers to the Agricultural Marketing Act.

Section 203(b)(7a) provides for an exemption from the economic regulation of this Commission of motor transportation when "incidental to transportation by aircraft." Section 204(a)(6) makes it our duty "to administer, execute, and enforce all provisions" of part II of the act and "to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration."

Admittedly, there is no provision of the act conferring "specific" authority to determine what motor operations come within the 203(b)(7a) partial exemption; but incontrovertibly and of necessity the duty "to administer," "to regulate," and "to make all necessary orders * * * and to prescribe rules and regulations" includes the power to define the terms used in the Interstate Commerce Act in accordance with the legislative intent. The very extent of the duty to administer and the duty to regulate depends upon and is limited by the scope of any exemption from regulations which the act provides. Clearly we must have, included in the power "to administer" the act and "to regulate," the power to determine the scope of any partial exemption from regulation. Compare *American Trucking Assns., Inc. v. United States,* 344 U. S. 298.

To say, as several interested parties do, that we have no power by general order to establish a rule by which to determine the limits of the involved exemption or that we must accept the C. A. B.'s interpretation of "service in connection with * * * air transportation," would be to ignore the practicalities of the situation and the past precedents by this Commission in interpreting the involved partial exemption. In addition, following such a course would invite illegal and unauthorized motor operations and, as a consequence thereof, a pethora of complaints calling for individual consideration which would unduly burden both the industry and this Commission in its regulation of motor carriers subject to part II of the act, and would defeat the very purpose of the partial exemption.

GENERAL CONTENTIONS OF THE PARTIES

The representations have been considered. Many helpful suggestions as to the regulations which we should adopt have been made—suggestions which, of course, vary greatly in their approaches to the situation and in the scope of the exemption which they envisage. Air Cargo, Inc., which acts as the agent of many scheduled air carriers in obtaining motor service for them, urges adoption of a rule which would follow the rationale of the *Kenny Panther*, and *Graff* decisions. This would have the effect of establishing as a limit to the maximum territorial scope of the exemption, except for emergency transportation, the terminal area of the direct air carrier transporting the shipment, as defined in its tariffs filed with and accepted by the C. A. B. Indirect air carrier associations, individual air freight forwarders, various uncertificated motor carriers, and certain other interested parties advocate an interpretation of section 203(b)(7a) exempting the collection, transfer, or delivery services within a terminal area having radii varying from 25 to 125 miles. While the last-named parties generally support the proposal embraced in the supplemental notice, most of them urge that the contemplated restrictions as to

air freight forwarder operations outside the terminal area are unnecessary, and that the shipping public is entitled to a single source of responsibility. The Air Freight Forwarders Association, by way of alternative, suggests that we impose a simple prohibition against the holding out by air freight forwarders that they act as a common carriers or surface freight forwarders prior to receiving shipments from or subsequent to delivering shipments to authorized carriers beyond the forwarder's terminal area.

One common carrier specializing in collection and delivery of air traffic asserts that all traffic having a prior or subsequent movement by air falls within the involved 203 (b)(7a) partial exemption. A manufacturer of critical defense items and an air freight forwarder urge the adoption of a so-called length-of-line-haul test which would exempt the motor transportation of traffic having a prior or subsequent air movement in all instances where the ground distance does not exceed the air distance. A noncertificated motor carrier engaged almost entirely in the handling of airfreight seeks an expansion of the section 203(b)(7a) exemption so as to cover all bona fide "incidental to-air operations without regard to (1) the type of billing utilized, (2) whether the carriage is performed as the agent of the shipper or that of the carrier (3) whether the shipment is domestic or international in character (4) whether the traffic is handled solely within an air carrier terminal area."

The motor carriers holding authority from this Commission and associations of such carriers take the view that the geographical limits of the section 203(b)(7a) exception should be much more restricted than those urged by the uncertificated motor carriers, the air carriers, and the air freight forwarders. They further urge that the same limits be imposed on the operations of air freight forwarders as on those of direct air carriers, and two associations contend that the supplemental notice envisions preferential treatment for air freight forwarders without legal or philosophic justification. One motor carrier argues that section

203(b)(7a) should be construed as exempting only collection, delivery, or transfer service which is occasional or casual or is performed in emergencies. Another party asks that the exemption be limited in scope to operations between airports, on the one hand, and, on the other, points within the commercial zone of the city or cities served by a given air terminal. Several parties suggest an approach similar to that followed in *Central Truck Lines, Inc. v. Pan-Atlantic S. S. Corp.*, 82 M. C. C. 395, wherein a determination was made as to the extent a water carrier could provide terminal services in the area surrounding ports it served. Although finding that the terminal area of a water carrier might, in some circumstances, extend beyond that of motor carriers serving the same point, as defined in *Commercial Zones and Terminal Areas*, 54 M. C. C. 21 (sixth supplemental report), the division followed the rationale of the *Terminal Areas* case. It stated, 82 M. C. S. at 404:

> Any service which goes beyond a single homogeneous community, identifiable as such by the factors of commercial and industrial integrity, population and business density, and the existence of some reasonably compact limit to the geographical scope of community affairs and influence, is intercommunity in character and cannot be considered as bona fide collection, delivery, and transfer service.

A number of the authorized motor carriers submitting representations urge that the precedent established in the *Graff* case, and followed since in dealing with emergency transportation, be modified restrictively. They cite examples of motor transportation allegedly performed unlawfully, under the guise of service provided due to emergency or adverse weather conditions. They claim that solicitors of airfreight often knowingly accept tonnage in excess of the capacity of scheduled flights, and then route overflow traffic by unauthorized motor carriers on the ground that an emergency situation exists.

DISCUSSIONS AND CONCLUSIONS

Although the air transportation industry was still in its infancy in 1938 when section 203(b)(7a) became part of the Interstate Commerce Act, it was already evident to Congress that airlines were engaged in the transportation of package express in addition to passengers, and that in the absence of an exemption, motor carriers transporting such packages within the municipalities served by the airlines would be subject to economic regulation of that act, as well as of the Civil Aeronautics Act of 1938. We believe that Congress must have had in mind at that time the probable future importance of air transportation, and that it intended by the enactment of section 203(b)(7a) to provide a statutory framework for its orderly growth.

Terminal services.—In issuing an interpretative regulation, as in all the other aspects of our administration of the Interstate Commerce Act, we are, of course, governed by the terms of the statute itself. From the clear language of section 203(b)(7a), it must be immediately apparent that this section does not exempt from the economic regulation of the act all motor transportation which bears a relationship, however remote, to transportation by aircraft, but only that motor transportation which is "incidental to transportation by aircraft." The key word here, we think, is "incidental." In the absence of any definitive legislative history or evidence to the contrary, we believe, having reviewed our past decisions involving section 203(b)(7a), that our prior interpretation is essentially correct, is consistent with the intent of the Congress, and is consonant with the aims of the national transportation policy.

In the *Kenny* case, "incidental" was defined as follows, 61 M. C. C. at 595:

> Motor transportation is "incidental" to transportation by air when that motor transportation is limited to a bona fide collection, delivery, or transfer service within a reasonable terminal area of the air carrier.

> Conversely stated, such motor transportation is not "incidental" to transportation by air when it is transportation having the character of a connecting-carrier line-haul service.

Webster's New International Dictionary, third edition (1962), defines incidental as:

> * * * subordinate, nonessential, or attendant in position or significance: as a: occurring merely by chance or without intention or calculation: likely to ensue as a chance or minor consequence—usually used with to * * * c: lacking in effect, force, or consequence: not receiving much consideration of calculation * * *

It is also helpful, we believe, to consider the meaning given to the term "incidental" in another section of part II of the Interstate Commerce Act—section 202(c), passed soon after section 203(b)(7a) was enacted. Section 202(c) clearly implies that "incidental" motor transportation is that performed within the terminal areas of line-haul carriers and consists of "collection, delivery, and transfer" service.

Having considered once again all the matters discussed above, we are convinced that the *Kenny* case was correct in finding that motor transportation, to come within the scope of the incidental-to-aircraft exemption, must be "confined to the transportation in bona fide collection, delivery or transfer service of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous movement under a through air bill of lading covering in addition to the line-haul movement by air the collection, delivery, or transfer service performed by motor carrier." 61 M. C. C. at 595.

The *Kenny* case went on to find that there was no need to define specifically the geographical limits within which exempt transportation might be performed. Instead, it provided only that in order to come within section 203

(b)(7a), transportation must be performed within the terminal area established by the line-haul air carrier in tariffs filed with the C. A. B. The assumption underlying this approach to the determination of the scope of the exemption was that the C. A. B. would not hesitate to reject a publication which would result in an unreasonably large exempt area. Our reevaluation of the situation in the light of the representations filed in the instant proceeding convinces us that this aspect of the *Kenny* decision, too, is correct and that the imposition of a definite mileage limitation is unnecessary. In reaching this conclusion, we have attached considerable significance to the representations of several of the parties specializing in the transportation of airfreight. They have taken the position that the present standard has encouraged the development of airfreight service, and that it should be retained. The C. A. B.'s actions since the promulgation of the *Kenny* criteria, particularly as reflected in the rules, contained in Appendix II hereto, which it has adopted, clearly illustrate that agency's reluctance to sanction any wholesale expansion of air-carrier terminal areas beyond the 25-mile rule of thumb which it has used for many years.

In deciding not to fix a maximum mileage limitation for the 203(b)(7a) exemption, we are obviously disagreeing with the contentions of various parties, including petitioners, that shippers and receivers in areas adjacent to cities and communities have the same need for all modes of transportation—rail, express, water, motor vehicle, and air; and that, therefore, the terminal areas of carriers of all modes should be identical. Each mode of transportation has its inherent advantages. Compare *Seatrain Lines, Inc., Extension—Savannah*, 285 I. C. C. 509, and *Schaffer Transp. Co. v. United States*, 355 U. S. 83. Various economic and geographic factors sometimes prompt utilization of one mode of transportation over others. In *Kenny, supra*, we recognized that the *modus operandi* of air carriers is sufficiently different from that of land carriers as to justify

special consideration in the matter of terminal area limits which may or may not be somewhat larger than those of land carriers. Compare *Pick-up of Livestock in Illinois, Iowa, and Wisconsin,* 238 I. C. C. 671, 248 I. C. C. 385, and 251 I. C. C. 549, and *Newtex S. S. Corp., Collection and Delivery Service,* 273 I. C. C. 304. Likewise, in the *Terminal Areas* case, *supra,* we noted additional reasons why terminal areas for non-land transportation carriers varied from those of motor carriers and freight forwarders subject to the act. Compare *Pan-Atlantic, supra.*

Some parties argue for an interpretation of section 203(b)(7a) which would allow the performance of exempt motor operations in areas extending up to 125 miles from airports, and some, in supporting a "length-of-line-haul" test or simply a "prior-or-subsequent-movement" test, would have the scope of the exemption extended even further. In our opinion such a theory would be in direct conflict with sections 206 and 209 of the act, and particularly of the national transportation policy, which requires that we recognize and preserve the inherent advantages of each mode of transportation subject to our regulation. We would not be complying with the congressional mandate were we to adopt, in the absence of a clear legislative directive, a regulation which would greatly increase the scope of exempt transportation at the expense of those motor carriers which are subject to the economic regulation of the Interstate Commerce Act.

In general, then, we are here reaffirming the decision in the *Kenny* case. However, it is clear from the record before us that many airfreight users are establishing plants outside the present terminal zones which air carriers have heretofore been allowed to establish in tariffs filed with the C. A. B. In recognition of this factor, the C. A. B., in its rule 222.3, reproduced in appendix II, is providing an application procedure whereby air carriers can seek permission to file tariffs offering pickup and delivery service at points beyond 25 miles of the airport or city limits of

certificated points. Under the *Kenny* decision, the geographical limit of the section 203(b)(7a) exemption at a given point would expand automatically should the C. A. B. allow air carriers to extend the area in which they offer terminal services. To permit such expansion without our retaining some control over it would, in our opinion, not be consistent with our statutory responsibility to insure that transportation partially exempt under section 203(b)(7a) is truly "incidental" to transportation by aircraft. We shall, therefore, make available a procedure whereby the geographical extent of the incidental-to-aircraft exemption can be individually determined. To achieve this purpose we will adopt regulations which will reflect the definition of the exemption originally made in the *Kenny* case but which will further provide that, either upon our own motion or upon petition of any interested person, a proceeding may be instituted looking toward the definition of the geographical extent of the 203(b)(7a) exemption at a particular point. In deciding this question, prior action of the C. A. B. allowing air carriers to publish extended terminal service tariffs would be considered, but would not be determinative.

Emergency transportation.—We come now to a consideration of substituted motor-for-air transportation performed in emergency situations. We think that the approach taken to this problem in the *Graff* decision and followed since then is sound and should be followed in the future. If the shipping public is to be served, carriers should be in a position to deliver airfreight even if the plane carrying it must, because of bad weather, for example, land at an airport far removed from the scheduled destination, or if a plane, because of equipment failure beyond the control of the direct air carrier, is not available. Consequently, we do not believe that it is advisable to attempt to set any specific mileage limit within which such emergency motor transportation must be performed if it is to fall within the scope of the section 203(b)(7a) exemption. We

wish to stress that motor transportation to fall within this category and thus to be exempt from our economic regulation must be truly emergency in character, and the rule to be adopted here will provide that it must be caused by conditions beyond the control of the air carrier. For example, it is apparent that several of the parties, particularly the air freight forwarders and uncertificated motor carriers, solicit air-freight without regard to the capacity of cargo planes scheduled to depart; and, at times, in total disregard of known capacities. The fact that existing available cargo space has been oversolicited does *not* constitute an emergency situation beyond the control of the air carrier such as would bring a substituted motor-for-air service within the ambit of section 203(b)(7a). Likewise, the fact that a city is served by an airport which is not equipped to receive jet cargo planes cannot be construed as clothing an operation from or to the nearest jet airport with the character of an emergency.

The decision as to what constitutes adverse weather or an emergency or impractical flying condition, is, in our opinion, one that must be made by the direct air carriers and their officials in the interest of public safety. In any case, whenever air traffic moves in substituted motor-for-air line-haul operations by an uncertificated motor carrier, there must exist some adverse weather o impractical condition or situation as decided by the *officials of the direct air carrier*, even though the involved traffic is moving on a through air freight forwarder's bill of lading.

Participation of air freight forwarders in air-motor transportation.—As was indicated by our supplemental notice of proposed rulemaking, issued October 17, 1963, we are not completely satisfied with the result reached in the *Panther* case. That decision held that the incidental-to-aircraft exemption applies to the transportation of shipments having a prior or subsequent movement by air freight forwarder only to the extent that the motor movement takes place within the terminal area of the direct air

carrier performing the line-haul transportation. Further consideration convinces us that whether a shipment moves under the billing of a direct air carrier or an air freight forwarder should have no effect upon the operation of the exemption. The Federal Aviation Act classifies both as air carriers, and an air freight forwarder is considered by the C. A. B. to be an air carrier. Also, the *Panther* decision may result in the anomalous situation in which an air freight forwarder, given the choice of utilizing one of the two direct air carriers between the same airports would find that a shipment transported by one could move overland in exempt motor service, while a shipment transported by the other could not. The rules adopted herein will not distinguish between direct and indirect air carriers, and the *Panther* case, to the extent inconsistent with this conclusion, is overruled.

The *Panther* case also held that any person "performing the functions of a freight forwarder" and "using" or "employing" motor carrier service between an airport and points beyond the terminal area of a direct area carrier serving that airport is a surface freight forwarder which requires operating authority under part IV of the Interstate Commerce Act. It was not intended by this decision to foreclose completely transportation service in which a shipment moves in part under the responsibility of an air freight forwarder and in part under the responsibility of a motor carrier subject to the act. The *Panther* holding was directed only to those activities of air freight forwarders which amount to surface freight forwarding under part IV of the Interstate Commerce Act. Some parties to this proceeding, however, have apparently construed this decision as precluding air freight forwarders, under any circumstances, from turning shipments over to or receiving shipments from motor carriers for the performance of regulated transportation. As thus interpreted, the *Panther* case has unnecessarily impeded freight forwarder participation in air-motor service, and it was the purpose of the

supplemental notice of proposed rulemaking to suggest a means of rectifying this situation.

An increasingly large volume of air freight is being handled by air freight forwarders, and a substantial portion of their traffic moves to or from points beyond the published terminal areas of air carriers. In such a situation the shipper normally is charged (1) the air forwarder's rates for service between the air terminal cities, and (2) the motor carrier's published charges for service between the air terminal city and the ultimate origin or destination point. Such air forwarder service is similar to that furnished by direct air carriers through connection with motor carriers, and, as a general rule, it appears that the shipping documentation clearly apprises the consignor or consignee that a connecting service is being performed and that the forwarder has no common carrier responsibility for the shipment while it is under the motor carrier's control. Such operations do not, we think, constitute surface freight forwarding under part IV of the Interstate Commerce Act. See *Alaska Freight Lines, Inc., v. Puget Sound Tug & Barge,* 94 M. C. C. 376. The considered operations are an integral part of what is patently a useful service to the shipping public, and as the line-haul surface movements will, of necessity, be performed by regulated motor carriers, we anticipate no adverse effect on such carriers as a result of our conclusions.

The supplemental notice of proposed rulemaking suggested a *modus operandi* whereby air freight forwarders could receive from or turn over to authorized motor carriers shipments the motor transportation of which does not come within the partial exemption of section 203(b)(7a). These standards appear to reflect the type of operation actually being conducted by some air forwarders, and the operations of others seem to be readily adaptable to their requirements. The regulations which we will adopt herein, and which are substantially the same as those proposed, will restrict air freight forwarders against holding out, in

any manner, that they assume or will assume responsibility for any shipment prior to its receipt from or after delivery to an authorized motor carrier for movement beyond the forwarders' terminal area. We will also forbid the receipt by an air forwarder of compensation from shippers for motor carriers for services rendered in connection with the receipt of shipments from or the delivery of shipments to a motor carrier performing regulated transportation. In reaching the conclusion that these limitations on the air freight forwarders' participation in surface transportation are necessary, we should point out that we are fully cognizant of the advantages which might accrue to the shipping public from a forwarding service able to assume complete responsibility from actual origin to ultimate destination. The assumption of such responsibility by air freight forwarders, however, would result in their instituting surface forwarding operations in violation of the licensing provisions of section IV of the Interstate Commerce Act.

Ultimate Conclusions and Findings

In conclusion, we must deal with the assertion made by several of the parties that this Commission is attempting to regulate air transportation. Congress, through the Interstate Commerce Act, has directed this Commission to maintain a strong and balanced motor carrier transportation system in furtherance of a national transportation policy. A review of the various sections of the Federal Aviation Act and the Interstate Commerce Act which were cited by various parties of record convinces us that the actions taken herein are in accordance with the national transportation policy and the past decisions of this Commission and do not conflict with the Federal Aviation Act, or the existing rules and regulations of the C. A. B. Our interpretation of the involved exemption conforms to the general practice of construing strictly any exemption. Any broader construction would without justification, serve only to divert traffic from authorized motor carriers and thereby defeat various

sections of the Interstate Commerce Act and the national transportation policy stated therein.

We find that title 49, chapter 1 of the Code of Federal Regulations requires modification by the addition thereto of section 210.40, "Motor Transportation of property incidental to transportation by aircraft," and part 404, "Exemptions," section 404.1, "Use by air freight forwarders of regulated motor common carrier service," containing the rules set forth in appendix III hereto; and that such rules are reasonable and necessary and should be prescribed.

An appropriate order will be entered.

VICE CHAIRMAN WEBB, dissenting:

Section 203(b)(7a) became law by virtue of the enactment of section 1107(j) of the Civil Aeronautics Act of 1938, 52 Stat. 1029. The Civil Aeronautics Act was repealed in its entirety by the Federal Aviation Act of 1958, although some provisions of the former act were reenacted by the latter. The reenactment did not include section 1107(j) nor any similar provision.

Section 203(b)(7a) has not been reenacted as part of the Interstate Commerce Act. Its continued existence was wholly dependent upon the continuance of section 1107(j) or a reenactment thereof. Repeal of the Civil Aeronautics Act without the reenactment of section 1107(j) must be regarded as repealing section 203(b)(7a).

It is highly probable that the Congress did not intend to repeal section 203(b)(7a). However, I do not believe that the search for legislative intent may be pressed so far as to resurrect a statute which does not actually exist. It is one thing to probe for congressional intent underlying a presently effective law, but it is quite a different matter to find that the Congress did not repeal what it very plainly did repeal.

In the final analysis, it is impossible to be absolutely sure that the repeal of section 203(b)(7a) was unintentional. The Congress might have felt that jurisdiction to fix the geographical limits of the incidental-to-air exemption should reside exclusively in the Civil Aeronautics Board under the powers conferred upon the Board by sections 101(20) and (21), 102, 403(a), 404, and 412(a) of the Federal Aviation Act of 1958. If that was the Congress' intent, it would have been consistent with a desire to avoid conflicting determinations of exempt incidental-to-air operations on the part of the Board and this Commission.

COMMISSIONER HERRING did not participate.

APPENDIX I.

Parties to the proceeding.

PETITIONERS.

American Trucking Associations, Inc.
National Motor Freight Traffic Association, Inc.
Indiana Motor Rate & Tariff Bureau, Inc.
Middle Atlantic Conference.
The New England Motor Rate Bureau.
AAA Trucking Corp.
A & H Truck Line, Inc.
The Adley Express Company.
Associated Transport, Inc.
Best Way of Indiana, Inc.
Branch Motor Express Co.
Bronx Despatch.
Chesapeake Motor Lines, Inc.
Commercial Motor Freight, Inc., of Ind.
Corey & Evans, Inc.
The Davidson Transfer & Storage Co.
Eastern Freight Ways, Inc.
Elgin Storage and Transfer Co.
Estes Express Lines.
Federal Express, Inc.
Fowler & Williams, Inc.
Haeckl's Express, Inc.
Harder's Express, Inc.
Hemingway Bros. Interstate Trucking Co.
Hermann Forwarding Company.
I. R. C. & D. Motor Freight, Inc.
Indianapolis & Southern Motor Express, Inc.
Ray Jones, d/b/a, Jones Transfer.
Kirby & Kirby, Inc.
McDaniel Freight Lines, Inc.
Merchants Freight, Inc.
Motor Freight Corporation.
Oneida Motor Freight, Inc.
Over-Nite Motor Service, Inc.
Pinter Bros., Inc.
R. D. Motor Express, Inc.
Red Star Express Lines of Auburn, Inc.
Reich Bros. Long Island Motor Freight, Inc.
Rupp-Southern-Tier Freight Lines, Inc.
Shein's Express.
Styles Express, Inc.
Tose, Inc.
Troiano Express Co., Inc.
Wooleyhan Transport Co.
Ziffrin Truck Lines, Inc.

OTHER INTERESTED PARTIES.

Air Cargo, Inc.
Air Dispatch, Inc.
Air Freight Forwarders Association.
Associated Truck Lines, Inc.
Blue Bonnet Express, Inc.
Brown Express Lines, Inc.
Central Freight Lines, Inc.
Direct Airport Service, Inc.
Eastern Industrial Traffic League, Inc.
East Texas Motor Freight Lines, Inc.
Edward H. Pollaci.
Emery Air Freight Corporation.
Film Carrier Conference of the ATA.
Georgia Highway Express, Inc.
Gillette Motor Transport, Inc.
Herrin Transportation Company.
Kellogg Communications Systems Dept.
Missouri Public Service Commission.
National Association of Motor Bus Owners.
National Bus Traffic Association, Inc.
National Film Carriers, Inc.
National Small Shipments Traffic Conference, Inc.
Norwalk Truck Lines of Delaware, Inc.
Norwalk Truck Lines, Inc.
Oklahoma City (Okla.) Chamber of Commerce.
Port of New York Authority.
Smith Cartaging.
State Corporation Commission of the State of Kansas.
Voss Truck Lines, Inc.
Western Truck Lines, Inc.
Wings and Wheels Express, Inc.
Wycoff Company, Incorporated.

APPENDIX II.

Regulations adopted by the Civil Aeronautics Board on April 28, 1964.

14 C. F. R. 222—Air Cargo Pickup and Delivery zones; Filing of Tariffs; Application for Authority to File.

§ 222.1 *Applicability.*

This part is applicable to the provision of pickup and delivery services in connection with air transportation of property at any point within the United States or its territories and possessions by any carrier subject to Part 221 of the Board's Economic Regulations.

§ 222.2 *Filing of Tariffs.*

In accordance with the provisions of Part 221 and this regulation, each carrier shall file tariffs covering all pickup and delivery services offered. Such tariffs will be accepted for filing if they meet the requirements of Part 221 and (a) provide for service to places which are not located beyond a radius of 25 miles of the airport of the city limits of the certificated point, or (b) provide for service to places or areas included in other currently effective pickup and delivery tariffs on file with the Board, or (c) are authorized upon application of the carrier filed in accordance with section 222.3 hereof. A certification shall accompany each tariff filing identifying the category within which each pickup and delivery service falls.

§ 222.3 *Service to Locations Not Previously Authorized.*

(a) *Application.* If a carrier, subject to this part, desires to file a tariff providing for pickup and delivery service to any location(s) not authorized by section 222.2 of this part, such carrier shall file with the Board a written

application for authority to do so. Such application, in an executed original and nineteen copies, shall be conspicuously entitled "Application for Tariff-filing Authority: Pickup and Delivery Zone"; shall clearly identify the location(s) for which tariff-filing authority is requested; shall state the reasons why service to such location(s) is deemed appropriate and set forth economic data and other facts relied upon; shall contain a notice that persons served may, within 15 days, file and serve an answer in support of or in opposition to the application; shall set forth the names and addresses of the persons required to be served and state that service has been made on all such persons by personal service or by registered or certified mail, and the date of such service. In the case of service by mail, the date of mailing shall be considered the date of service. Each copy of an application served pursuant to this Part shall state that such service is made pursuant to Part 222 of the Civil Aeronautics Board's Economic Regulations.

(b) *Service of Application.* A copy of each application shall be served upon such persons as the Board may designate in a particular case, and in all cases shall be served upon each scheduled air carrier and air freight forwarder which regularly renders service to or from a point involved, and upon the Secretary, Interstate Commerce Commission, Washington 25, D. C. The Board shall also publish notice of the application in the Federal Register.

(c) *Answers.* Any interested person may file an answer with the Docket Section of the Board in opposition to or in support of an application. In the case of persons served by the applicant under paragraph (b), answers shall be filed no later than 15 days after the filing of the application. In the case of other interested persons, answers shall be filed no later than 15 days after publication of notice of the application in the Federal Register. An answer shall be filed in an executed original and nineteen copies. It shall set forth in detail the reasons for the position taken and include such economic data and facts as are relied upon.

It shall also be served upon the applicant and state the date of such service. Unless ordered by the Board upon application or upon its own motion, further pleadings will not be entertained.

(d) *Order of Approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.

(e) *Effectiveness of Authority.* Authority to include any location(s) in a pickup and delivery tariff granted pursuant to the procedure of this section shall be subject to revision or revocation without evidentiary hearing.

APPENDIX III.

Regulations adopted.

A.

49 C. F. R. 210.40. Motor transportation of property incidental to transportation by aircraft.

(a) Property moving in collection, delivery, or transfer service.—Transportation of property by motor vehicle is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act provided (1) that it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier or air freight forwarder (indirect air carrier) providing the line-haul transportation, which terminal area, if the line-haul air transportation is provided by a carrier subject to economic regulation under the Federal Aviation Act, has been described in a tariff filed with and accepted by the Civil Aeronautics Board, and (2) that it is confined to the transportation of shipments which have been received from or will be delivered to a direct air carrier or air freight forwarder as part of a continuous movement which, if provided by an air carrier subject to economic regulation under the Federal Aviation Act, shall be provided for in tariffs filed with and accepted by the Civil Aeronautics Board, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier.

(b) Substitution of motor-for-air transportation due to emergency conditions.—Transportation of property by motor vehicle is transportation incidental to transportation by aircraft if it constitutes substituted motor-for-air service, performed at the expense of the direct air carrier or air

freight forwarder, on a through air bill of lading, in emergency situations arising from the inability of the direct air carrier to perform air transportation due to adverse weather conditions, equipment failure, or other causes beyond the control of the direct air carrier.

(c) Individual determination of exempt zones.—Upon its own motion or upon petition filed by any interested person the Interstate Commerce Commission may, in an appropriate proceeding, determine whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within the provision of paragraph *(a)* of this section, should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or air freight forwarder holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

B.

49 CFR 404 *Exemptions.*

49 CFR 404.1 *Use by air freight forwarders of regulated motor common carrier service.*—An air freight forwarder (indirect air carrier) subject to economic regulation under the Federal Aviation Act may receive from or turn over to motor common carriers subject to economic regulation under part II of the Interstate Commerce Act shipments the transportation of which is not within the scope of the incidental-to-aircraft exemption of section 203(b)(7a) of the Interstate Commerce Act without being considered as conducting operations as a freight forwarder subject to part IV of the Interstate Commerce Act provided:

(a) That the air freight forwarder shall not hold out to assume responsibility for, nor make any claim in its advertising, solicitation of freight, or tariff publications that it will assume responsibility for, any shipment prior to its receipt from or after it is turned over to an authorized motor common carrier for movement beyond the air freight forwarder's terminal area as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

(b) That all shipping documents issued by the air freight forwarder shall state clearly that its responsibility for the shipment does not extend beyond its actual air movement and the territorial extent of its terminal area as provided for in tariffs published with the Civil Aeronautics Board.

(c) That the air freight forwarder shall receive no compensation from any shipper or motor carrier for services rendered in connection with the receipt of shipments from or the delivery of shipments to a motor carrier for movement beyond the air freight forwarder's terminal area.

ORDER.

TITLE 49—TRANSPORTATION

CHAPTER 1—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER B—CARRIERS BY MOTOR VEHICLE

210—EXEMPTIONS

SUBCHAPTER D—FREIGHT FORWARDERS

PART 404—EXEMPTIONS

No. MC-C-3437.

MOTOR TRANSPORTATION OF PROPERTY INCIDENTAL TO TRANSPORTATION BY AIRCRAFT.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of May A. D. 1964.

IT APPEARING, That the Commission, division 1, by notice and order entered October 4, 1963, instituted the above-numbered proceeding under Part II of the Interstate Commerce Act (more specifically sections 204(a)(6) and 203(b)(7a) thereof) and section 4 of the Administrative Procedure Act to determine whether the facts and the circumstances require or warrant this Commission to define by regulation the transportation by motor vehicle that is is exempt from economic regulation under section 203(b)-(7a) of the Interstate Commerce Act, and for the purpose of taking such other and further action as the facts and circumstances may justify or require;

IT FURTHER APPEARING, That the Commission, by supplemental notice and order entered October 17, 1963, reopened this proceeding under parts II and IV of the act

(more specifically sections 204(a)(6) and 403(a) thereof) and section 4 of the Administrative Procedure Act to encompass certain other matters described in the said supplemental notice;

It Further Appearing, That said notice and orders entered October 4, 1961, and October 17, 1963, invited the participation of motor carriers, air carriers, or other interested person or persons by submitting for consideration written statements of facts, views, and arguments with the Commission at its office in Washington; and that notice to all interested persons was given through publication of the said notice in the Federal Register (26 F. R. 9569 and 28 F. R. 11235);

And It Further Appearing, That the Commission, on the date hereof, has made and filed a report herein setting forth the basis of its conclusions and its findings therein, which report is hereby referred to and made a part hereof;

It Is Ordered, That Title 49 CFR be, and it is hereby, amended by adding thereto section 210.40, Motor transportation of property incidental to transportation by aircraft, and part 404, Exemptions, section 404.1. Use by air freight forwarders of regulated motor common carrier service, containing the regulations set forth in Appendix III to the said report;

It Is Further Ordered, That this order shall become effective June 24, 1964, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And It Is Further Ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the office of the Secretary of the Interstate Commerce Commission at Washington, D. C., and by filing a copy with the Director, Office of the Federal Register.

[52 Stat. 1029, 49 U. S. C. 303(b)(7a); 52 Stat. 1237, 49 U. S. C. 304(a)(6); 66 Stat. 285, 49 U. S. C. 1003(a); 60 Stat. 237, 5 U. S. C. 1003]

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

Office-Supreme Court, U.S.
FILED
MAR 30 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1004

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC., FILM CARRIER CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC. AND AIR FREIGHT FORWARDERS ASSOCIATION,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

SUPPLEMENT TO JURISDICTIONAL STATEMENT.

ARTHUR R. LITTLETON,
HAROLD S. SHERTZ,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109

LOUIS P. HAFFER,
ROBERT M. BECKMAN,
703 Ring Building,
Washington, D. C. 20036
Attorneys for Appellants.

Of Counsel:

MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109

March 30, 1965.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1004

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC., FILM CARRIER CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC. AND AIR FREIGHT FORWARDERS ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

SUPPLEMENT TO JURISDICTIONAL STATEMENT.

This Supplement to Petitioners' Jurisdictional Statement is submitted to bring to the Court's attention the decision of the United States Court of Appeals for the District of Columbia Circuit in *Railway Express Agency* v. *Civil Aeronautics Board,* No. 18,868, decided March 18, 1965, attached hereto as Appendix A. This decision was

announced too late to be included in Petitioners' Jurisdictional Statement which, on March 18, 1965, was being printed for filing March 19, 1965, in accordance with the order of the Court below, although the Jurisdictional Statement was not due under this Court's Rules until April 10, 1965.

The Court below in the instant appeal held that the ICC had final authority and jurisdiction to determine when motor transportation, performed as part of a through air-motor movement under a single bill of lading, was "air-transportation" or "incidental to transportation by aircraft." The Court below had held that to the extent that its decision permitted conflict in jurisdiction between the ICC and CAB,

> "This possible conflict could be avoided through the use of a Joint Board as provided in Section 1003 of the Federal Aviation Act. 49 U.S.C.A. 1483." Opinion, n. 5."

This precise question as to the availability and application of the Joint Board provisions of the Federal Aviation Act was decided in the negative by the Court of Appeals for the District of Columbia in *Railway Express Agency* v. *Civil Aeronautics Board, supra.* In that case, REA argued that it was acting as an ICC regulated surface carrier and had entered into contracts with specific air carriers for through service and joint rates. REA had requested the Board to refer the case to a Joint Board under Section 1003 of the Federal Aviation Act, essentially the procedure envisaged by the Court below in the instant case for solution of conflicting jurisdictional questions between the CAB and ICC.

The CAB determined that REA was performing "air transportation" as to its surface movements, since the freight moved under a single receipt and REA assumed

complete responsibility to the shipper for the entire move. The CAB held that REA was acting as an air freight forwarder without authority.

The Court of Appeals sustained the CAB. The Court held that REA's contentions were not consistent with "the regulatory system ordained by Congress." It held,

> "Under the Federal Aviation Act, the Board is given *exclusive* authority and responsibility for the economic regulation of the air transportation industry, *as therein defined.*" (Emphasis supplied.)

As for Section 1003, the Joint Board provisions, the Court held that this section did not apply "where a surface carrier engages in operations which the Act includes in its definition of 'air transporation.'" The Court pointed out that "the operation of assembling packages for air shipment is performed largely by concerns known as air freight forwarders. These concerns are extensively regulated by the Board." It concluded,

> "We cannot agree that Section 1003 has the effect of allowing REA's entry, without Board approval, into an industry expressly committed by Congress to the *exclusive* regulatory power of the Board." (Emphasis supplied.)

This decision presents an additional ground for plenary consideration of the instant appeal. There is a conflict among the Circuits. The Three-Judge statutory court in the Eastern District of Pennsylvania decided, in the instant case subject of this appeal, that the ICC had final authority to determine whether an air freight forwarder's use of motor surface transportation was or was not "air transportation." The Court of Appeals for the District of Columbia held that only the CAB can determine this question. This honorable Court should grant plenary consid-

eration, with briefs and oral argument, to resolve the direct conflict.

Respectfully submitted,

ARTHUR R. LITTLETON,
HAROLD S. SHEETZ,
LOUIS P. HAFFER,
ROBERT M. BECKMAN,

Attorneys for Appellants.

Of Counsel:

MORGAN, LEWIS & BOCKIUS.

Dated: March 30, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,868

RAILWAY EXPRESS AGENCY, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN AIRLINES, INC., UNITED AIR LINES, INC. AND TRANS WORLD AIRLINES, INC., *Intervenors*

Petition for Review of an Order
of the Civil Aeronautics Board

Decided March 18, 1965

Mr. William Q. Keenan, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. John E. Powell* was on the brief for petitioner.

Mr. O. D. Ozment, Associate General Counsel, Litigation and Legislation, Civil Aeronautics Board with whom *Assistant Attorney General William H. Orrick, Jr.* and *Messrs. John H. Wanner*, General Counsel, *Joseph B. Goldman*, Deputy General Counsel, and *Robert L. Toomey*, Attorney, Civil Aeronautics Board, and *Lionel Kestenbaum*, Attorney, Department of Justice, were on the brief, for respondent.

Mr. Louis P. Haffer for intervenor Air Freight Forwarders Association.

Mr. Gordon W. Bickert, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Warren E. Baker* and *Joseph F. Healy, Jr.* were on the brief for intervenor Trans World Air-

lines, Inc., argued for intervenors Trans World Airlines, Inc., American Airlines, Inc. and United Air Lines, Inc.

Messrs. Robert L. Stern and *James Francis Reilly* were on the brief for intervenor United Air Lines, Inc.

Mr. Alfred V. J. Prather was on the brief for intervenor American Airlines, Inc.

Before BAZELON, *Chief Judge*, and FAHY and WRIGHT, *Circuit Judges*.

WRIGHT, *Circuit Judge*: By its Order No. E-20332, the Civil Aeronautics Board disapproved certain agreements entered into between the Railway Express Agency, Inc. (REA) and various airlines.[1] Under each agreement the airline promised to carry, between specified points, cargo "presently moving in the services of [REA]" to the extent the airline determined it had space available. The

[1] The airlines involved were Alaska Airlines, Inc., Eastern Airlines, Inc., The Flying Tiger Line Inc., Pan American World Airways, Inc., Riddle Airlines, Inc., Slick Corporation, and Transportation Corporation of America. The agreements had been submitted by the airlines for approval under § 412 of the Federal Aviation Act of 1958, 72 STAT. 770, 49 U.S.C. § 1382, which provides in pertinent part:

> "(a) Every air carrier shall file with the Board a true copy * * * of every contract or agreement * * * affecting air transportation * * * between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.
>
> "(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter * * *."

parties agreed that the airline should receive a fixed amount for each 100 pounds of cargo carried[2] and that REA would receive "the balance of the charges collected from the public." REA was to issue to the shipper its Uniform Express Receipt, on which it assumed responsibility to the shipper for the entire transportation, but the agreement provided that, as between themselves, each party would bear liability for damages occurring during its carriage of the shipment.

REA contended before the Board that the agreements were simply contracts between itself (a surface carrier subject to regulation by the Interstate Commerce Commission) and a specific air carrier for through service and joint rates, and that such contracts were clearly authorized under Section 1003 of the Federal Aviation Act.[3]

---

[2] The Board found that in the Alaska Airlines and the Flying Tiger Line agreements the rate charged by the airline was equal to or less than the local deferred freight rate regularly charged by the airline.

[3] Section 1003, 72 STAT. 791, 49 U.S.C. § 1483, provides:

"(a) The Board and the Interstate Commerce Commission shall direct their respective chairmen to designate, from time to time, a like number of members of each to act as a joint board to consider and pass upon matters referred to such board as provided in subsection (c) of this section.

"(b) Air carriers may establish reasonable through service and joint rates, fares, and charges with other common carriers; except that with respect to transportation of property, air carriers not directly engaged in the operation of aircraft in air transportation (other than companies engaged in the air express business) may not establish joint rates or charges, under the provisions of this subsection, with common carriers subject to the Interstate Commerce Act. In case of through service by air carriers and common carriers subject to the Interstate Commerce Act, it shall be the duty of the carriers parties thereto to establish just and reasonable rates, fares, or charges and just and reasonable classifications, rules, regulations, and practices affecting such rates, fares, or charges,

The Board concluded, however, that the operations of REA under the proposed agreements would not be those of a joint carrier of through traffic, but rather that the agreements called for REA to undertake indirectly to

or the value of the service thereunder, and if joint rates, fares, or charges shall have been established with respect to such through service, just, reasonable, and equitable divisions of such joint rates, fares or charges as between the carriers participating therein. Any air carrier, and any common carrier subject to the Interstate Commerce Act, which is participating in such through service and joint rates, fares, or charges, shall include in its tariffs, filed with the Civil Aeronautics Board or the Interstate Commerce Commission, as the case may be, a statement showing such through service and joint rates, fares, or charges.

"(c) Matters relating to such through service and joint rates, fares, or charges may be referred by the Board or the Interstate Commerce Commission, upon complaint or upon its own initiative, to a joint board created as provided in subsection (a) of this section. Complaints may be made to the Interstate Commerce Commission or the Board with respect to any matter which may be referred to a joint board under this subsection.

"(d) With respect to matters referred to any joint board as provided in subsection (c) of this section, if such board finds, after notice and hearing, that any such joint rate, fare, or charge, or classification, rule, regulation, or practice, affecting such joint rate, fare, or charge or the value of the service thereunder is or will be unjust, unreasonable, unjustly discriminatory or unduly preferential or prejudicial, or that any division of any such joint rate, fare, or charge, is or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, it is authorized and directed to take the same action with respect thereto as the Board is empowered to take with respect to any joint rate, fare, or charge, between air carriers, or any divisions thereof, or any classification, rule, regulation, or practice affecting such joint rate, fare, or charge or the value of the service thereunder.

"(e) Orders of the joint boards shall be enforceable and reviewable as provided in this chapter with respect to orders of the Board."

engage in air transportation—an undertaking which requires Board authorization not presently held by REA.[4] The Board's conclusion was based on its finding that, as contemplated by the parties to each agreement, REA would be responsible to the shipper for the entire transportation and could charge the shipper a rate having no relation to the rate payable to the airline. The Board found, moreover, that REA would determine whether or not to ship any particular shipment by air and, if so and a choice of airline existed, REA could determine which airline to use. In short, the Board found that REA would be engaged in selling air transportation to the public. Since REA has no authority so to do, the agreements were held to violate the Federal Aviation Act and, hence, under Section 412, were not entitled to Board approval.

REA petitioned the Board for reconsideration and, in addition, requested that the Board refer the case to a joint board appointed under Section 1003, or, in the alternative, that the Board grant REA a hearing. The Board denied these requests and refused to reconsider its order. REA now petitions for review of the actions of the Board.[5]

The Federal Aviation Act permits engagements in air transportation, whether direct or indirect, only by persons who hold a certificate of public convenience and necessity

---

[4] Section 401(a), 72 STAT. 754, 49 U.S.C. § 1371(a), provides:

> "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

The term "air carrier" is defined in § 101(3), 72 STAT. 737, 49 U.S.C. § 1301(3), as follows:

> " 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation * * *."

[5] Jurisdiction in this court is based on Section 1006 of the Federal Aviation Act, 72 STAT. 795, 49 U.S.C. § 1486.

issued by the Civil Aeronautics Board,[6] or who have been exempted from the provisions of the Act.[7] The Board has defined an "indirect air carrier" as one who "holds out to the public that it will undertake to transport property by air, and enters into contracts with shippers wherein it binds itself to discharge such an undertaking with respect to particular shipments."[8] In this case the Board found, upon substantial evidence, most of which was submitted by REA at the Board's invitation, that REA's operations under the proposed agreements would constitute indirect air carriage.[9] Since REA is not authorized to carry on such operations, approval of the agreements was properly withheld.

The case would end here were it not for REA's contention that in the situation presented here Section 1003

---

[6] See Note, 4, *supra*.

[7] Under Section 101(3) of the Federal Aviation Act, 49 U.S.C. § 1301(3), the Board may grant an indirect air carrier an exemption "from the provisions of this chapter to the extent and for such periods as may be in the public interest." See *American Airlines* v. *Civil Aeronautics Board*, 7 Cir., 178 F.2d 903 (1949).

[8] *Railway Express Agency, Grandfather Certificate*, 2 C.A.B. 531, 536 (1941). See also *Consolidated Flower Shipments* v. *Civil Aeronautics Bd.*, 9 Cir., 213 F.2d 814 (1954); *National Air Freight Forward. Corp.* v. *Civil Aero. Bd.*, 90 U.S.App.D.C. 330, 331-332, 197 F.2d 384, 385-386 (1952); *American Airlines* v. *Civil Aeronautics Board, supra* Note 7; *Intra-Mar Shipping, Enforcement Proceeding*, 27 C.A.B. 568 (1958).

The Board's definition of this statutory term is entitled to the deference usually accorded to statutory interpretations given by the agency charged with the administration of the statute. *Udall* v. *Tallman*, —— U.S. —— (No. 34, Oct. Term, 1964, decided March 1, 1965), slip opinion p. 14; *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946).

[9] Under well settled principles of judicial review of administrative action, Board findings supported by the record are conclusive. 49 U.S.C. § 1486(e); *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944).

of the Federal Aviation Act overrides the requirement that indirect carriers be either certificated under Section 401 or exempted under Section 101(3). In essence, REA contends that when a surface carrier contracts with a direct air carrier and the contract calls for the surface carrier to operate as an indirect air carrier, the requirement for Board authorization differs from what it would be if no surface carrier were involved. This difference arises, according to REA, because of the provisions in Section 1003 which authorize air carriers to "establish reasonable through service and joint rates, fares, and charges with other common carriers" and which provide procedures for regulation of the rates, charges, and practices of carriers operating under through service arrangements. Under REA's theory, all transportation in which the cargo is carried part way by surface carrier and part way by air must be regulated by a joint board convened according to Section 1003(a).

Such a construction, however, is not consistent with the regulatory system ordained by Congress. Under the Federal Aviation Act, the Board is given exclusive authority and responsibility for the economic regulation of the air transportation industry, as therein defined. No one is permitted to engage in air transportation, either directly or indirectly, without Board authorization, either in the form of a certificate or, in the case of indirect carriers, possibly by exemption. Section 1003 is not designed to create an exception to the Board's responsibility in those cases where a surface carrier engages in operations which the Act includes in its definition of "air transportation." That section merely provides a procedure for regulation of rates and practices in cases where an air carrier arranges with a surface carrier for through transportation services. When such an arrangement is made, and each participating carrier is operating within the proper scope of its authority, Section 1003 provides a method which

may be invoked by either the Board or the Interstate Commerce Commission for regulating the participating carriers. But when, as in this case, an arrangement for through service calls for the surface carrier to perform operations which require permission from the Board, the surface carrier is not relieved of the necessity of obtaining such permission.

Adoption of the statutory construction urged by REA would give Section 1003 an effect which could hardly have been intended by Congress. At present, the operation of assembling packages for air shipment is performed largely by concerns known as air freight forwarders.[10] These concerns are extensively regulated by the Board.[11] In the past REA has sought authority from the Board to operate as an air freight forwarder.[12] The Board has refused such authority because it felt that the impact of REA's entry into the industry would have effects harmful to the public.[13] However, it is now argued that

---

[10] An "air freight forwarder" is defined as one who "in the ordinary and usual course of its undertaking, assembles and consolidates or provides for assembling and consolidating of property or performs or provides for the performance of break-bulk and distributing operations with respect to consolidated shipments, or both, is responsible for the transportation of such property from the point or receipt to point of destination, and utilizes for the whole or any part of such transportation the services of a direct air carrier." 14 C.F.R. § 297.2 (1964).

[11] The Board's regulations concerning air freight forwarders appear at 14 C.F.R. Parts 296 and 297 (1964).

[12] See *Railway Express, Airfreight Fowarder Application*, 27 C.A.B. 500 (1958); and *cf. Railway Express Agency, Inc., and Northwest Airlines, Inc., Agreement*, 9 C.A.B. 905 (1948).

[13] *Railway Express, Airfreight Forwarder Application*, *supra* Note 12 at 537-538. Another reason for the Board's refusal is the fact that REA is controlled by railroads. See Section 408 of the Federal Aviation Act, 72 STAT. 767, 49 U.S.C. § 1378; *Railway Express, Airfreight Forwarder Application*, *supra* Note 12 at 502-504. *Cf. National Air Freight Forword. Corp. v. Civil Aero. Bd.*, *supra* Note 8.

Section 1003 permits REA to engage in operations which the Board has held to be not in the public interest. We cannot agree that Section 1003 has the effect of allowing REA's entry, without Board approval, into an industry expressly committed by Congress to the exclusive regulatory power of the Board.[14]

REA also contends that the Board erred in denying its request for a hearing. This request was made at the same time REA petitioned for reconsideration of the Board's order disapproving the agreements. The Board had previously invited REA to submit any relevant information. REA has done this, and it was on this information that the Board based its order.

Section 412 contains no requirement for a hearing in contract approval proceedings. Nevertheless, REA contends that it is entitled to a hearing as a matter of due process.[15] But due process does not require that every administrative action be preceded by a hearing. The underlying facts of REA's operations under the proposed agreements were not disputed. The Board accepted as true the information submitted by REA. The only issues before the Board involved the legal consequences of those facts. Under such circumstances, a hearing is not required.[16]

Affirmed.

---

[14] We find nothing in the legislative history of Section 1003 to warrant the conclusion that the section was intended to provide any exceptions to the broad provision in Section 401. See H.R.Rep. No. 2254, 75th Cong., 3d Sess., p. 8 (1938).

[15] *Cf. Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950); *The Japanese Immigrant Case*, 189 U.S. 86 (1903).

[16] *Mississippi River Fuel Corp.* v. *Federal Power Com'n*, 108 U.S.App.D.C. 284, 292, 281 F.2d 919, 927 (1960), *cert. denied*, 365 U.S. 827 (1961).

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 21 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1004

AIR DISPATCH, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

ROBERT J. CORBER,
1100 Shoreham Building,
Washington, D.C. 20005,
Counsel for The National Association of Motor Bus Owners.

DREW L. CARRAWAY,
JOHN S. FESSENDEN,
618 Perpetual Building,
Washington, D.C. 20005,
Counsel for The National Bus Traffic Association, Inc.

PETER T. BEARDSLEY,
RICHARD R. SIGMON,
1616 P Street, N.W.,
Washington, D.C. 20036,
Counsel for American Trucking Associations, Inc.

BRYCE REA, JR.,
1329 E Street, N.W.,
Washington, D.C. 20004,
Counsel for National Motor Freight Traffic Association, Inc.

Of Counsel:

REA, CROSS & KNEBEL,
1329 E Street, N.W.,
Washington, D.C. 20004.

RICE, CARPENTER & CARRAWAY,
618 Perpetual Building,
Washington, D.C. 20004.

STEPTOE & JOHNSON,
1100 Shoreham Building,
Washington, D.C. 20005.

April 21, 1965.

INDEX

	Page
Statement of the Case	2
Argument	4
Jurisdiction of the Interstate Commerce Commission	4
There Is No Judicial Conflict	9
Conclusion	14
Appendix A	16
Appendix B	28

Table of Citations

Cases:

Air Cargo Terminals, Inc., Extension—San Bernardino, Calif., 88 M.C.C. 468 (1961)	8
Air Dispatch, Inc. v. *United States*, 237 F. Supp. 450 (E.D. Pa. 1964)	21
City of Philadelphia v. *Civil Aeronautics Board*, 289 F. 2d 770 (D.C. Cir. 1961)	9
Commodity Haulage Corp. Common Carrier Application, 69 M.C.C. 527 (1957)	7
Fischer Common Carrier Application, 83 M.C.C. 229 (1960)	8
Golembiewski Common Carrier Application, 48 M.C.C. 1 (1948)	7
Kenny Extension—Air Freight, 49 M.C.C. 182 (1949)	4, 7
Kenny Extension—Air Freight, 61 M.C.C. 587 (1953)	7
Koch Common Carrier Application, 49 M.C.C. 555 (1949)	7
Markham v. *Cabell*, 326 U.S. 404 (1945)	5
Michaud Common Carrier Application, 73 M.C.C. 677 (1957)	7
Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71 (1964)	2
Nickerson Common Carrier Application, 88 M.C.C. 186 (1961)	8

Page

Panther Cartage Co. Extension—Air Freight, 88 M.C.C. 37 (1961) 8
Peoples Express Co., Ext.—Air Freight, 48 M.C.C. 393 (1948) 7
Port Columbus Cab Co., Contract Carrier Application, 24 M.C.C. 332 (1941) 7
Railway Express Agency v. *Civil Aeronautics Board*, No. 18868 (D.C. Cir. decided March 18, 1965) 12
Railway Express Agency, Inc., Ext.—Bristol, R.I., 31 M.C.C. 385 (1941) 7
Railway Express Agency, Inc. Ext.—Clarksburg-Buckhannon, 31 M.C.C. 700 (1942) 7
Railway Express Agency, Inc. Ext.—West Unity-Middletown, 31 M.C.C. 385 (1941) 7
Railway Express Agency, Inc. Ext.—West Warwick, R.I., 31 M.C.C. 363 (1941) 7
Scari Extension—Airports, 76 M.C.C. 319 (1958) 7
Sky Freight Delivery Service, Inc., Common Carrier Application, 47 M.C.C. 229 (1947) 7
Southern Pacific Transport Co.—Air Freight, 73 M.C.C. 345 (1957) 7
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) 15
United States v. *Menasche*, 348 U.S. 528 (1955) 5
United States v. *Powers*, 307 U.S. 214 (1939) 5
United States v. *Radio Corp. of America*, 358 U.S. 334 (1959) 15
Vanden Heuvel Extension—Bendix and Midway Airports, 78 M.C.C. 41 (1958) 7
Wycoff Co., Inc. Extension—Airfreight, 89 M.C.C. 369 (1961) 8
Wycoff Company, Inc. v. *United States*, No. C 108-62 (D. Utah, decided March 31, 1965) 10

Statutes:

Administrative Procedure Act

Section 4, 5 U.S.C. § 1003 2

Federal Aviation Act

	Page
Section 402(a), 49 U.S.C. § 1373(a)	12
Section 1003, 49 U.S.C. § 1483	5
Section 1003(a), 49 U.S.C. § 1483(a)	5
Section 1003(b), 49 U.S.C. § 1483 (b)	6, 12, 13
Section 1003(c), 49 U.S.C. § 1483 (c)	14

Interstate Commerce Act

Section 202(a), 49 U.S.C. § 302(a)	4, 5
Section 203(a)(10), 49 U.S.C. § 303(a)(10)	4, 5
Section 203(b), 49 U.S.C. § 303(b)	2
Section 203(b)(7a), 49 U.S.C. § 303(b)(7a)	2, 3, 6, 7, 8, 11, 12, 14
Section 204(a)(1), 49 U.S.C. § 302(a)(1)	5
Section 402(a)(5), 49 U.S.C. § 1002(a)(5)	12
Section 402(a)(7), 49 U.S.C. § 1002(a)(7)	12

Miscellaneous:

S. Rep 510, 80th Cong., 1st Sess	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1004

AIR DISPATCH, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Appellees, National Association of Motor Bus Owners, National Bus Traffic Association, Inc., American Trucking Associations, Inc.,[1] and the National Motor Freight Traffic Association, Inc. intervened as defendants in the action below pursuant to 28 U.S.C. §2323, as associations of motor carriers of passengers and property who were parties to the proceeding before the Interstate Commerce Commission in which the order under review was made. Pursuant to Rule 16(1)(c) of the Rules of this Court, these Appellees move that the judgment of the District Court be affirmed.

---

[1] American Trucking Associations, Inc., is erroneously shown as a party to the Jurisdiction Statements filed by Appellants.

Statement of Case

Section 203(b)(7a) of the Interstate Commerce Act, 49 U.S.C. §303(b)(7a), exempts from economic regulation by the Interstate Commerce Commission "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft. . . ." Pursuant to the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §1003, the Interstate Commerce Commission instituted a rule making proceeding, *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 (1964) (J.S. 7a-45a), to define the scope of the partial exemption granted by Section 203(b)(7a). The regulations subsequently adopted by the Commission, insofar as they are in issue here, defined transportation of property by motor incidental to transportation by aircraft within the meaning of Section 203(b)(7a) as transportation in bona fide collection, delivery, or transfer service within air cargo terminal areas described in the tariffs of air carriers filed with the Civil Aeronautics Board, when performed on through air bills of lading covering both the line haul movement by air and the collection, delivery or transfer service by motor.

Appellants filed suit in the United States District Court for the Eastern District of Pennsylvania to set aside the Commission's report and order. Since that report and order did not run against Appellants individually and did not require them to do or refrain from doing anything, the only justiciable issue on Appellants' complaint to the District Court, and hence the only issue here, is the jurisdiction of the Commission to define the scope of the exemption from its economic regulatory authority granted by Section 203(b)(7a) of the Interstate Commerce Act. As the court below said:

"[The] determination [of this issue] is dispositive of this litigation since inquiry into the substance of the regulations would be premature. No conflict between the [Civil Aeronautics] Board and the Commission has arisen nor have these regulations been attacked as an unreasonable exercise of the authority vested in the Commission." (J.S. 6a).

Addressing itself to the issue of the Commission's jurisdiction, the District Court held:

"It cannot be argued that the Commission lacks jurisdiction to regulate all common carriers (motor vehicles) involved in the movement of goods in interstate commerce to the extent that the issue involved pertains to (1) the qualifications of employees of the common carriers, (2) the maximum hours of work by employees, (3) the safety regulations to be followed by the carriers, or (4) the equipment standards to be met by the carriers. The Commission also has authority to economically regulate all motor vehicles involved in interstate commerce except when the motor vehicles are used exclusively in the collection, delivery or transfer of goods incidental to transportation by aircr[illegible] Excluding this partial exemption of Section 203 (b)(7a), the Commission has regulatory authority over all motor vehicles in interstate commerce. The determination of the scope of this exemption from economic regulation must logically fall on the Commission. Whether this determination is accomplished on an ad hoc basis as in *Kenny* and the cases following that decision, or by use of the rule making power does not

alter the right to make such a determination." (J.S. 4a-5a).[2]

ARGUMENT

Jurisdiction Of The Interstate Commerce Commission

The theory of Appellants' case is that the Interstate Commerce Commission has no economic regulatory authority over any transportation by motor vehicle rendered in connection with transportation by air. This is untenable. Part II of the Interstate Commerce Act vests in the Interstate Commerce Commission regulatory authority over "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. . . ." Section 202(a), 49 U.S.C. §302(a). Interstate commerce is "commerce between any place in a State and any place in another State or between places in the same State through another State, *whether* such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water." Section 203(a)(10), 49 U.S.C. § 303(a)(10), emphasis supplied.

Appellants argue that the "whether" clause following the definition of interstate commerce compels the conclusion that a motor carrier is not engaged in transportation in interstate commerce within the meaning of Section 203(a)(10) if the transportation it performs is preceded or followed by air transportation. This misconstrues the effect of that clause. It does not narrow the definition of interstate commerce that immediately precedes it, nor is its effect to exempt any motor carriers engaged in the interstate commerce defined in Section 203(a)(10) from the regulatory

---

[2] The *Kenny* Case to which the District Court referred is *Kenny Extension—Air Freight*, 49 M.C.C. 182 (1949), 61 M.C.C. 587 (1953), in which the Commission enunciated and applied on an *ad hoc* basis the definition its rules in issue codify.

authority vested in the Commission by Section 202(a). On the contrary, the effect of the clause is simply to make clear that notwithstanding that motor carriers join with rail or water carriers or express companies in the performance of transportation in interstate commerce, they are to be regulated under Part II and not under any other part of the Interstate Commerce Act.

All of the exemptions from economic regulation by the Interstate Commerce Commission are contained in Section 203(b), which exempts various types of motor transportation, including in subsection (7a) transportation "incidental to transportation by aircraft." If, as Appellants assert, Section 203(a)(10) removed all motor transportation preceded or followed by transportation by aircraft from the sweep of the Interstate Commerce Act the exemption in subsection (7a) would be meaningless. The Congress does not enact meaningless legislation and the courts will not construe statutes on the assumption that it does. Hence, statutes are construed, if possible, to give every section of them force and effect. *United States* v. *Menasche*, 348 U. S. 528, 538, 539 (1955); *Markham* v. *Cabell*, 326 U. S. 404, 409 (1945); *United States* v. *Powers*, 307 U. S. 214, 217 (1939). Moreover, if Section 203(a)(10) excluded all motor transportation in connection with air transportation from the Interstate Commerce Act the Commission would not have the authority Appellants concede it has, namely authority under Section 204(a)(1), 49 U.S.C. §304(a)(1), to regulate the qualifications and hours of service of employees, safety of operations and standards of equipment of motor carriers engaged in such transportation.

Furthermore, Appellants' premise ignores and would render meaningless Section 1003(a) of the Federal Aviation Act, 49 U.S.C. §1483. That Section authorizes air carriers to "establish through service and joint rates, fares,

and charges with other common carriers." It provides that in case of "through service by air carriers and common carriers subject to the Interstate Commerce Act, it shall be the duty of the carriers parties thereto to establish just and reasonable rates . . . and if joint rates shall have been established just, reasonable, and equitable divisions [thereof] as between the carriers participating therein." Tariffs are required to be filed with both the Civil Aeronautics Board and the Interstate Commerce Commission, and both the rates and the divisions of joint rates are subject to regulation by a joint board comprised of an equal number of members of each agency. Obviously the Congress enacted these provisions in recognition of the fact that the Interstate Commerce Commission has economic regulatory authority over motor transportation when in combination with air transportation except that which is "incidental to transportation by aircraft" within the meaning of Section 203(b)(7a).

Moreover, the Congress confirmed the Commission's jurisdiction to economically regulate motor carriers engaged in transporting air freight when it amended Section 1003 of the Federal Aviation Act to permit air and surface carriers to render through service at a combination of their local rates, published in the case of motor carriers in tariffs filed with the Commission and in the case of air carriers in tariffs filed with the Board.[3] In hearings on that amendment the General Counsel of the American Trucking Associations explained that:

> "Motor carriers already have local rates published. This is necessary under part II of the Interstate Commerce Act. It is understood that the air carriers

[3] Section 1003(b), as originally enacted in 1938 (52 Stat. 1020), required the establishment of joint rates and a consequent system of divisions for air and motor carriers to provide a through service.

> also have ready for use their tariffs of local rates; a combination of such rates to provide through service is permitted as between surface carriers but prohibited as between surface carriers and air carriers. The motor carriers with their presnt publications are ready and willing to provide through service with the air carriers by combining the local rates. . . ." S. Rep. 510, 80th Cong., 1st Sess., p. 4.

The consistent construction of a statute by the agency charged with administering it is of course entitled to great weight. The Commission has exercised for many years the authority Appellants contend it does not have, sometimes to grant and sometimes to deny licenses to operate, and sometimes to hold no license necessary by virtue of the exemption in Section 203(b)(7a). See, for example, *Port Columbus Cab Co., Contract Carrier Application,* 24 M.C.C. 237 (1940); *Railway Express Agency, Inc. Ext.—West Warwick,* R.I., 31 M.C.C. 332 (1941); *Railway Express Agency, Inc. Ext.—West Unity-Middletown,* 31 M.C.C. 363 (1941); *Railway Express Agency, Inc. Ext.—Bristol, R.I.,* 31 M.C.C. 385 (1941); *Railway Express Agency, Inc. Ext.—Clarksburg-Buckhannon,* 31 M.C.C. 700 (1942); *Sky Freight Delivery Service, Inc. Common Carrier Application,* 47 M.C.C. 229 (1947); *Golembiewski Common Carrier Application,* 48 M.C.C. 1 (1948); *Peoples Express Co., Ext.—Air Freight,* 48 M.C.C. 393 (1948); *Koch Common Carrier Application,* 49 M.C.C. 555 (1949); *Kenny Extension—Air Freight,* M.C.C. 182 (1949); *Kenny Extension—Air Freight,* 6 M.C.C. 587 (1953); *Commodity Haulage Corp. Common Carrier Application,* 69 M.C.C. 527 (1957); *Southern Pacific Transport Co.—Air Freight,* 73 M.C.C. 345 (1957); *Michaud Common Carrier Application,* 73 M.C.C. 677 (1957); *Scari Extension—Airports,* 76 M.C.C. 319 (1958); *Vanden Heuvel Extension—Bendix and Midway*

Airports, 78 M.C.C. 41 (1958); *Fischer Common Carrier Application*, 83 M.C.C. 229 (1960); *Panther Cartage Co. Extension—Air Freight*, 88 M.C.C. 37 (1961); *Nickerson Common Carrier Application*, 88 M.C.C. 186 (1961); *Air Cargo Terminals, Inc., Extension—San Bernardino, Calif.*, 88 M.C.C. 468 (1961); *Wycoff Co., Inc., Extension—Air Freight*, 89 M.C.C. 369 (1961).

Finally, the Civil Aeronautics Board, the administrative agency charged with promoting and regulating air transportation, agrees that whether the motor transportation of air freight in a particular instance is or is not incidental to transportation by aircraft within the meaning of Section 203(b)(7a) of the Interstate Commerce Act is a question to be answered by the Commission. Thus, in its brief *amicus curiae* filed in the court below it said:

> "There is no conflict between the Board and the Commission, and the regulations of the two agencies were adopted in an effort to reach a practical accommodation with respect to the problems involved. As set forth in the government's brief, the Board is of the view that, since Section 203(b)(7a) is contained in the Interstate Commerce Act, the Interstate Commerce Commission has jurisdiction to initially determine its scope. While differences conceivably might arise between the agencies with respect to whether particular transportation falls within the statutory exemption, such differences would go to the correctness of the Commission's determination as opposed to its power to make it. In these circumstances, the Board has no objection to the Commission's reservation of jurisdiction in 49 C.F.R. 210.40, and perceives no reason why the Court need consider the question of the relative weight to be given to Board and Commission views when and if a conflict occurs."

There Is No Judicial Conflict

There is no "conflict among the circuits" as Appellants contend (Supp. J.S. 3). On the contrary, there is a uniformity of opinion between the court below and the only other two courts which have considered the question. In *City of Philadelphia* v. *Civil Aeronautics Board,* 289 F.2d 770 (D.C. Cir. 1961), the court agreed that the Federal Aviation Act does not vest in the Board regulatory authority over motor transportation preceding or following air transportation. In that case the Board held that an air carrier certificated to serve Philadelphia could discharge its duty to render adequate service by rendering it by aircraft to and from the airport at Newark, N. J. and by trucks between Newark and Philadelphia. In affirming that holding, the Court of Appeals said:

> "... we think the Board adequately and correctly disposed of [the argument that the motor movement between Newark and Philadelphia was not exempt from economic regulation by the Interstate Commerce Commission], when it said:
>
> > '• • • We are not asserting jurisdiction over the motor carrier as an air carrier nor are we determining the status of the truck operation under the Interstate Commerce Act. Whether the Philadepphia-Newark truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Ac , and thereby exempt from economic regulation under that statute, is a matter for the Interstate Commerce Commission.' "
>
> 289 F. 2d at 774.

True enough, in *Philadelphia* the Board held and the court agreed that the air carrier's service at issue would

"*as to it,* constitute air transportation." 289 F. 2d at 774, emphasis supplied. However, the Board's words "as to it" and the court's exposition in support of its conclusion (289 F. 2d at 773-774) make plain that no more was meant than that the air carrier was performing air transportation to and from Philadelphia within the meaning of Section 101(21) of the Federal Aviation Act and in compliance with its certificate notwithstanding that the aircraft did not physically arrive at and depart from the Philadelphia airport. As the court below said:

> "An interline movement of property partly by air and partly by motor vehicle may be air transportation for purposes of providing service to points for which a certificate of public convenience and necessity has been issued (under the Federal Aviation Act) and at the same time the motor [transportation] would not be incidental to the transportation of the property by aircraft." (J.S. 6a).

In *Wycoff Company, Inc.* v. *United States of America and Interstate Commerce Commission,* decided March 31, 1965, the United States District Court for the District of Utah affirmed the Commission's denial of a certificate of public convenience and necessity to perform the motor transportation of air freight to and from points beyond the terminal area of Salt Lake City established by the air carriers in tariffs filed with the Civil Aeronautics Board. The plaintiff's first attack on the Commission's order was stated by the three judge court as follows:

> "That the Commission does not have jurisdiction over ground transportation of commodities incidental to movement by aircraft and, hence, does not have authority to determine the limits of this exemption by decision or regulation; or at least that there is irreconcilable conflict between the authority of the Commission

and the Civil Aeronautics Board in this area." (Appendix A, p. 19.)

Rejecting this contention, the court held:

> "It is our opinion that the Commission clearly possessed jurisdiction to determine the extent of the statutory exemption provided by Section 203(b)(7a), supra.
>
> "The line of demarcation between exempt and unexempt service is equally important for the purposes of the application of permissible regulations to motor carriers and the withholding of inpermissible ones by the Commission. The Commission has the broad power 'to administer, execute and enforce all provisions . . .' of Part II of the Act dealing with motor carriers, 'to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedures for such administration.' The determination of the area of exemption through case by case adjudication or by general rule subject to case by case application, is within the Commission's competence. And there appears no real dissonance, in theory or in practice, between the voices of the Commission and the Federal Aeronautics Board in this area, taking into consideration their respective objectives and functions in view of the national transportation policy." (Footnote omitted; Appendix A, pp. 20-21).

The court then went on to say that it agreed with the views of the court below in the case at bar and to point out that the plaintiff's reliance on *Philadelphia*, supra, was misplaced because that case "went no further than to hold that Flying Tiger's proposed service 'would, as to it, constitute air transportation and that in rendering (such) service the airline will be fulfilling its obligation under its certificate.'" Appendix A, p. 21, n. 13.

In their Supplement To Jurisdictional Statement Appellants wholly misconstrue *Railway Express Agency* v. *Civil Aeronautics Board,* decided March 18, 1965 by the United States Court of Appeals for the District of Columbia Circuit, in a vain effort to find a "conflict among the circuits." In that case REA, a surface common carrier operating under license from the Interstate Commerce Commission, entered into contracts with various airlines under which the latter agreed to carry freight moving in the service of REA at a fixed rate per 100 pounds. The Board refused to approve the contracts on the ground that they contemplated the performance of indirect air transportation by REA that the Board had previously refused it authority to perform. The basis of the Board's conclusion was that, *vis a vis* the shipping public, REA would assume responsibility to the shipper for the entire movement of his shipment, could charge a rate wholly unrelated to the rate REA paid the airline, and would determine whether or not to move the shipment by air, and, if so, by what airline. In short, the Board found that REA proposed to do precisely what it had licensed air freight forwarders to do.[4]

REA's argument was that its contracts contemplated through service between it as a licensed surface carrier and the airlines as licensed air carriers, which service is authorized by Section 1003(b) of the Federal Aviation Act

---

[4] A freight forwarder is defined in Section 402(a)(5) of the Interstate Commerce Act as one who, *inter alia,* holds itself out to the public to provide, and assumes the responsibility for, transportation of property from point of receipt to point of destination and who utilizes, "for the whole or any part of the transportaton," the services of common carriers subject to the Interstate Commerce Act. However, Section 402(a)(7) excludes from regulation by the Commission that part of the operations of a forwarder "for the performance of which the services of an air carrier . . . are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 203(b)(7a) of this Act is utilized." Such operations constitute air freight forwarding, i.e., indirect air transportation, and are regulated by the Civil Aeronautics Board.

and is subject to regulation as to rates by a joint board of the Interstate Commerce Commission and the Civil Aeronautics Board. The Court of Appeals, accepting the Board's findings that REA proposed to engage in the business of air freight forwarding, i.e., in air transportation within the meaning of the Federal Aviation Act, held that Section 1003(b) could not be construed to permit the performance of air transportation by one not licensed by the Board. To quote the court:

> "That section merely provides a procedure for regulation of rates and practices in cases where an air carrier arranges with a surface carrier for through transportation services. When such an arrangement is made, and each participating carrier is operating within the proper scope of its authority, Section 1003 provides a method which may be invoked by either the Board or the Interstate Commerce Commission for regulating the participating carriers. But when, as in this case, an arrangement for through service calls for the surface carrier to perform operations which require permission from the Board, the surface carrier is not relieved of the necessity of obtaining such permission." (Supp. J.S. 11-12).

It is thus apparent that there is no conflict between the holding in the *REA* Case and the holding of the District Court here. On the contrary, the two holdings are in harmony. Just as the *REA* Case held that the Civil Aeronautics Board has authority to initially determine what constitutes air transportation subject to its regulation under the Federal Aviation Act, so the court below held that the Interstate Commerce Commission has authority to initially determine what constitutes motor transportation subject to its regulation under the Interstate Commerce Act. True enough, conflicts may arise. Thus the Inter-

state Commerce Commission might hold particular motor transportation subject to its regulation on the ground that it is not incidental to transportation by aircraft within the meaning of Section 203(b)(7a) of the Interstate Commerce Act and the Board might hold the same transportation subject to regulation by it on the ground that it is service in connection with air transportation within the meaning of Section 403(a) of the Federal Aviation Act. However, the Commission and the Board simultaneously promulgated regulations after consultation with each other. The Commission's regulations set forth the criteria for determining when motor transportation is incidental to transportation by aircraft. The Board's regulations (Appendix B hereto) set forth the same criteria for determining when motor transportation is service in connection with air transportation. Thus the possibility of conflict is remote. Should it arise in a particular case it can be, indeed must be, resolved by the courts in the exercise of their authority as the final arbiters of the scope of the jurisdiction of administrative agencies.[5]

Conclusion

In conclusion, we point out there is nothing unusual in the division of authority between two agencies of the federal government, each charged with implementing a different facet of Congressional policy. This makes con-

[5] The suggestion of the court below in its footnote 5 that conflict could be avoided by the use of a joint board created under Section 1003 of the Federal Aviation Act was not made in brief or argument to the court and reflects a misreading of that Section. As was pointed out in the *REA* Case, Section 1003 provides for a joint board only to deal with matters relating to "through service and joint rates." Section 1003(c). Whether the participants in through service have the requisite authority to perform transportation is a matter for independent determination, by the Board in the case of air transportation and by the Commission in the case of surface transportation. However, this casual suggestion of the court in no way affects the correctness of its judgment or of the opinion supporting it.

flict possible. See for example *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964) in which action by the Federal Power Commission under the Natural Gas Act was set aside as in conflict with the anti-trust laws. And see *United States* v. *Radio Corp. of America*, 358 U. S. 334 (1959), in which action by the Federal Communications Commission under the Communications Act was permitted to be challenged as in conflict with the anti-trust laws. It may be that the possibility of conflict between the Interstate Commerce Commission and the Civil Aeronautics Board will one day present the courts with a problem in a particular case. But this is no reason to refuse to interpret the governing statutes as the Congress wrote them.

For all of the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

ROBERT J. CORBER,
1100 Shoreham Building,
Washington, D.C. 20005,
Counsel for The National Association of Motor Bus Owners.

DREW L. CARRAWAY,
JOHN S. FESSENDEN,
618 Perpetual Building,
Washington, D.C. 20005,
Counsel for The National Bus Traffic Association, Inc.

PETER T. BEARDSLEY,
RICHARD R. SIGMON,
1616 P Street, N.W.,
Washington, D.C. 20036,
Counsel for American Trucking Associations, Inc.

BRYCE REA, JR.,
1329 E Street, N.W.,
Washington, D.C. 20004,
Counsel for National Motor Freight Traffic Association, Inc.

Of Counsel:

REA, CROSS & KNEBEL,
1329 E Street, N.W.,
Washington, D.C. 20004.

RICE, CARPENTER & CARRAWAY,
618 Perpetual Building,
Washington, D.C. 20004.

STEPTOE & JOHNSON,
1100 Shoreham Building,
Washington, D.C. 20005.

April 21, 1965.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

No. C 108-62

WYCOFF COMPANY, INCORPORATED, *Plaintiff*,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Defendants*.

Before Honorable DAVID T. LEWIS, United States Circuit Judge, Honorable WILLIS W. RITTER, Chief United States District Judge, and Honorable A. SHERMAN CHRISTENSEN, United States District Judge.

Harry D. Pugsley, Esquire, for plaintiff.

John H. D. Wigger, Esquire, Attorney, Department of Justice, and William T. Thurman, Esquire, United States Attorney for the District of Utah (William H. Orrick Jr., Assistant Attorney General of the United States, with them on the briefs), for the United States of America.

Thomas H. Ploss, Esquire, Assistant General Counsel, Interstate Commerce Commission (Robert W. Ginnane, Esquire, General Counsel and Leonard S. Goodman, Esquire, Assistant General Counsel, Interstate Commerce Commission, with him on the briefs), for the Interstate Commerce Commission.

MEMORANDUM DECISION

CHRISTENSEN, D. J.

By this action in which a statutory [1] three-judge court has been convened the plaintiff, Wycoff Company, Inc., challenges the report and order of the Interstate Commerce

[1] 28 U.S.C. §§ 2284 and 2321-25. See also 28 U.S.C. §§ 1336, 1338.

Commission[2] determining the extent to which plaintiff's motor carrier service to and from the Salt Lake City Airport is exempt from regulation under Section 203(b)(7a) of the Interstate Commerce Act, 49 U.S.C. 303(b)(7a)[3] and finding that the public convenience and necessity did not justify related operations by plaintiff beyond such exemption.

Plaintiff began airfreight service to and from the Salt Lake City Airport outside the scope of its existing certification by the Commission as a motor carrier of property in the belief that such operations were exempt from regulation notwithstanding that they involved in instances motor transportation up to several hundred miles. Apparently to set developing questions at rest, in 1958 plaintiff filed with the Commission an application for a certificate of public convenience and necessity authorizing it to transport commodities having a prior or subsequent movement by aircraft between the Salt Lake City Airport and places in Utah and surrounding states already served by plaintiff under its existing authority to transport newspapers, motion picture film and other express-type commodities.[4] In the alternative, or to the extent these operations were not to be authorized by certificate, plaintiff requested the Commission to determine that its motor carrier service was exempt as "incidental to transportation by aircraft" within the meaning of Section 203(b)(7a), supra.

Plaintiff's application was protested by common carriers of property holding certificates for competing operations; a hearing was had, and the Commission examiner, without

---

[2] *Wycoff Company, Incorporated, Extension-Airfreight*, Docket No. MCC-89684 (Sub. No. 23), 89 M.C.C. 369, reaffirmed except for minor changes not here in question by an order of the full Commission dated May 22, 1964.

[3] "Nothing in this Chapter, except the provisions of 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall be construed to include . . . 7(a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft."

[4] Authority for certain additional routes also was sought by the applicant and denied by the examiner, but these are not in issue here.

attempting to delineate the extent of the (7a) exemption, recommended that the Commission grant a certificate for most of the services proposed by plaintiff. On November 22, 1961, the Commission (Division 1), entered its report and order defining the exempt operations in harmony with the limiting [5] guidelines which it theretofore had established in the *Kenny* case,[6] accepting the examiner's findings of fact, but determining contrary to the conclusions of the examiner that the plaintiff has not established a public need for any of its proposed operations beyond the exempt zone. Plaintiff's petition for reconsideration of this decision was denied, and suit in this court was instituted on June 25, 1962.

In the meantime, a broad rule making proceeding [7] had been instituted by the Commission for the purpose of generally interpreting by regulation the statutory exemption of "transportation incidental to movements by aircraft." On September 21, 1962, the Commission entered an order reopening the proceeding on review here, for future consideration in light of possible developments in the rule making proceeding. After extended hearings in the latter proceeding, rules on the subject were adopted by the Commission on May 4, 1964.[8] These rules generally followed

---

[5] The exempt operations were generally confined by the adopted formula, for reasons hereafter discussed, to an area within 25 miles of the airport.

[6] *Kenny Extension—Air Freight, 61 M. C. C. 587 (1953).* In this decision pickup and delivery areas described in tariffs filed by airlines with the Civil Aeronautics Board were accepted by the Commission as establishing *prima facie* exempt zones. Within these zones, motor transportation of air freight was accepted by the Commission as incidental to transportation by aircraft, permitting airlines, freight forwarders and shippers to use the partially exempt motor carriers although not certificated for these operations. Beyond these zones, airlines and shippers were required to use certificated motor carriers, unless specific applications were approved by the Commission for enlargement of the zone in view of special circumstances.

[7] No. MC-C 3437, *Motor Transportation of Property Incidental to Transportation by Aircraft.*

[8] *Motor Transportation of Property Incidental to Transportation by Aircraft,* 95 M. C. C. 71. The regulations have been codified as 49 C. F. R. 210.40 and 404, 404.1. The text of the regulations also is set out in 95 M. C. C. 94-95.

the rationale of the *Kenny* case, supra, so far as material here. On May 22, 1964, the Commission entered an order modifying its previous order to formally harmonize the two proceedings, but the modification constituted a substantial affirmation. Thus, the modified order dismissed plaintiff's application for a certificate of public convenience and necessity insofar as the proposed operation was exempt in terms of the new regulation rather than merely with reference to the *Kenny* case, and denied the application for certification of proposed operations beyond the exemption defined in the regulation.

The plaintiff attacks the action of the Commission by three contentions:

1. That the Commission does not have jurisdiction over ground transportation of commodities incidental to movement by aircraft and, hence, does not have authority to determine the limits of this exemption by decision or regulation; or at least that there is irreconcilable conflict between the authority of the Commission and the Civil Aeronautics Board in this area.

2. In the event the Commission had jurisdiction to make the determination in question, it erred in its application of the law by engrafting upon the statutory exemption in effect a mileage limitation; or a zone limitation keyed to the tariff schedules filed by the airlines with the approval of the Civil Aeronautics Board.

3. The Commission's reversal of the examiner's conclusions and its denial of a certificate of public convenience and necessity for the proposed operations beyond the statutory exemption as interpreted, were arbitrary and capricious.

Before discussing these claims it must be decided procedurally whether we should consider certain evidence tendered by plaintiff *dehors* the record made before the Commission. The rule is well settled that proceedings such as this are not *de novo*, and ordinarily it is improper to allow the Commission's findings to be attacked or supported in court by evidence which the Commission had no

opportunity of considering.[9] We do not believe that departure from established principles is warranted by the fact of the rule making proceeding or the subsequent entry of the modified order after the filing of plaintiff's original complaint; nor does the limited purpose for which the new evidence was offered [10] justify it. In any event, the preferred evidence was not of a character to throw into question the conclusions reached here.

It is our opinion that the Commission clearly possessed jurisdiction to determine the extent of the statutory exemption provided by Section 203(b)(7a), supra.

The line of demarcation between exempt and unexempt service is equally important for the purposes of the application of permissible regulations to motor carriers and the withholding of impermissible ones by the Commission. The Commission has the broad power "to administer, execute and enforce all provisions . . ." of Part II of the Act dealing with motor carriers, "to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedures for such administration." [11] The determination of the area of exemption through case by case adjudication or by general rule subject to case by case application, is within the Commission's competence. And there appears no real dissonance, in theory or in practice, between the voices of the Commission and the Federal Aeronautics Board in this area, taking into consideration their respective objectives and functions in view of the national transportation policy. The convincing foundations for these conclusions have been so recently and well stated by another three-judge court, with the views of which we agree, as to make extended discussion

---

[9] *Louisville & Nashville Railroad Co.* v. *United States*, 282 U. S. 740 (1931); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282 (1934); cf. *American Trucking Ass'ns.* v. *United States*, 344 U. S. 298 (1953).

[10] "To assist the court in making a proper interpretation of the true scope of the exemption statute."

[11] Section 204(a)(6) of the Interstate Commerce Act, 49 U. S. C. 304 (a)(6); *American Trucking Assn., Inc.* v. *United States*, 344 U. S. 298 (1953).

here on the point unnecessary.[12] The reliance placed by plaintiff upon the so-called *Flying Tiger* decision to establish conflicting jurisdiction in the Civil Aeronautics Board is misplaced.[13]

Having concluded that the Interstate Commerce Commission had jurisdiction to define the scope of the exemption granted by Section 203(b)(7a), and to regulate plaintiff's operations beyond the exempted operations as so defined, it is necessary to determine whether the regulation and decision constitute an arbitrary, unreasonable or unlawful exercise of the Commission's discretion. We are satisfied that they do not.

In MC-C-3437, the rule making proceeding which furnishes the basis of the Commission's order under attack, it is held (insofar as material here) that "(t)ransportation of property by motor vehicle is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) . . . provided (1) that it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct aircarrier . . . providing the line-haul transportation, which . . . if the line-haul air transportation is provided by a carrier subject to economic regulation under the Federal Aviation Act, has been described in a

---

[12] See *Air Dispatch Inc.* v. *United States and Interstate Commerce Commission*, No. 36000, D. C. D. Pa. 1964 ——— F. Supp. ———. In this decision Judge Davis concludes for the court: "The determination of the scope of this exemption from economic regulation must logically fall on the Commission. Whether this determination is accomplished on an *ad hoc* basis as in *Kenny* and the cases following that decision or by use of the rule making power, does not alter the right to make such a determination."

[13] *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F2 770 (D. C. Cir. 1961). The decision of the Board as sustained by the Third Circuit [sic] went no further than to hold that Flying Tiger's proposed service "would, as to it, constitute air transportation and that in rendering (such) service the airline will be fulfilling its obligations under its certificate." The Board had added that "(I)f the (Interstate Commerce) Commission should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have or obtain the requisite I. C. C. authority in order for Flying Tiger Lines to operate in the manner it proposes."

tariff filed with and accepted by the Civil Aeronautics Board, and (2) that it is confined to the transportation of shipments which have been received from or will be delivered . . . as part of a continuous movement which, if provided by an air carrier subject to economic regulation under the Federal Aviation Act, shall be *provided for in tariffs filed with and accepted by the Civil Aeronautics Board*, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier."[14] (Emphasis added.)

It is to the provision emphasized above, confining the exempted transportation to shipments constituting a part of a continuous movement provided for in tariffs accepted by the Civil Aeronautics Board, that plaintiff particularly objects, since such tariffs ordinarily are not approved by the Board if they involve terminal deliveries beyond 25 miles from an airport. This regulation, plaintiff argues, places a mileage restriction upon the meaning of "incidental," contrary to the intent of the exemption statute. The further objection is raised that if the Commission has power to determine the scope of the exemptions, it may not delegate this to either the air carrier over which it has no jurisdiction or to the C.A.B. And plaintiff contends that the Commission fell into its "error" because of its or the Board's preoccupation with ground services from airports in congested eastern areas bearing no comparison to the situation of western airports spaced "several hundred miles apart."

The discussion in MC-C-3437 *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 et seq., supra, outlines the considerations leading to the adoption of the regulations and orders under attack.[15] The Commission has recognized that inflexible

---

[14] 49 C. F. R. 210-40. Additional provisions in the regulation for temporary substitution of motor-for-air transportation due to emergency conditions, and others covering airfreight forwarders, are not here pertinent.

[15] Among other things it is said: "The Kenny case went on to find that there was no need to define specifically the geographical limits within

mileage restrictions should not be imposed but that the relationship of airline tariffs approved by the Board to incidental transportation services furnishes at least a general practical guide, subject to re-evaluation by the Commission under special circumstances.[16] The plaintiff complains because the Commission in evaluating the circumstances of this case did not extend the exempt zone to include a large industrial plant situated slightly beyond 25 miles from the airport and hence not included in approved airline tariffs. We cannot say that even this exclusion was arbitrary or capricious in view of the entire record. But this complaint is a mere incident of plaintiff's

which exempt transportation might be performed. Instead, it provided that in order to come within section 203(b)(7a), transportation must be performed within the terminal area established by the line-haul air carrier in tariffs filed with the C.A.B. The assumption underlying this approach to the determination of the scope of the exemptio was that the C.A.B. would not hesitate to reject a publication which ould result in an unreasonably large exempt area. Our re-evaluation of the situation in the light of the representations filed in the instant proceeding convinces us that this aspect of the Kenny decision, too, is correct and that the imposition of a definite mileage limitation is unnecessary. In reaching this conclusion, we have attached considerable significance to the representations of several of the parties specializing in the transportation of air freight. They have taken the position that the present standard has encouraged the development of airfreight service, and that it should be retained. The C.A.B.'s actions since the promulgation of the Kenny criteria, particularly as reflected in the rules, contained in Appendix II hereto, which it has adopted, clearly illustrate that agency's reluctance to sanction any wholesale expansion of air-carrier terminal areas beyond the 25-mile rule of thumb which it has used for many years . . ." 95 M.C.C. p. 85.

[16] "(c) Individual determination of exempt zones.—Upon its own motion or upon petition filed by any interested person, the Interstate Commerce Commission may, in an appropriate proceeding, determine whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within the provisions of paragraph (a) of this section, should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or air freight forwarder, holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board." 95 M.C.C. 95.

argument which involves a frontal attack on any restriction which would preclude its transportation of airfreight under a through air bill of lading from the Salt Lake Airport to any place specified in the bill of lading. We agree with the defendants that to allow a motor carrier by virtue of any claimed exemption from regulation to transport shipments any distance so long as they had prior or subsequent movements by aircraft, could only result in the rapid deterioration of effective motor carrier regulation in interstate commerce.

Movements of freight by motor carriers "incidental to transportation by air" within the contemplation of the statute must mean something different than "motor carrier movements preceding or following air transportation." The required relationship to air transportation must be an *incidental* one. In considering the meaning of the exempting language it appears proper and necessary to consider the nature and circumstances of the air transportation, including the holding out of its extent by the approved tariffs of the airlines. To constitute a movement incidental to air transportation, we believe that such movement must be incidental to some particular air transportation, not merely to the broad system of air traffic as a whole. Being incidental, one of the relevant circumstances would seem to be its context with the regulatory plan to which the airline in question is subject. This is not the only possible factor, and indeed it is not accepted as such by the Commission's regulation. Yet it is a relevant circumstance historically, practically and conceptionally, the application of which in this case cannot be deemed to be irrational. A similar recognition of the limiting meaning of the term in relation to the actual operations of the airlines will go far toward answering the plaintiff's contention that the regulation must necessarily be tailored specially for areas where airports, and particularly those receiving jet aircraft, are widely spaced, and that the existing ones are arbitrary and unrealistic as applied particularly to the Salt Lake area.[17] Congress by the exception could not have

[17] "The commission's interpretation," says plaintiff, "would make 'incidental' a provincialism, wholly unrealistic in light of the vast western area between airports."

meant to fill the gaps between airports however extended, by a wholesale substitution of unregulated motor carrier service. The exception covers handling of airfreight by motor carrier only to the extent that this reasonably can be deemed incidental to air transportation facilities and services in actual operation.

We conclude that the definition of the exempt zone, as applied to plaintiff's operations,[18] was not inconsistent with the statute, was not unreasonable nor arbitrary, was justified by adequate findings of fact supported by competent evidence, and was in keeping with persuasive historical and practical considerations. Since the decision under review with respect to the exemption rests upon a rational basis, the informed discretion of the Commission must be upheld.[19]

The record also supports the findings and conclusions of the Commission that plaintiff failed to establish a present or foreseeable future need for that part of the proposed service embracing "nonexempt" movements of air freight between the Salt Lake City Airport and points outside the air carriers' terminal areas on presently authorized routes, despite the recommendations of the examiner to the contrary.[20]

---

[18] The Commission found that the proposed operation by applicant as a common carrier by motor vehicle is exempt from certificate requirements to the extent that it is confined to the transportation in bona fide collection, delivery, or transfer service of shipments which have been received from or will be delivered to, an air carrier as part of a continuous movement under a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by applicant between the Salt Lake City Airport, Utah, on the one hand, and, on the other, points named in the Salt Lake City Airport tariffs of the air carriers performing the air portion of the line-haul transportation of such shipments as filed with the Civil Aeronautics Board.

[19] *American Trucking Assn.* v. *United States*, supra, 344 U. S. 298 (1953); *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194 (1947).

[20] The Commission found that the examiner's findings to the extent they went were accurate and entitled to adoption as supplemented by the Commission, but that despite the efficient service of the plaintiff as found by the examiner: "Six motor common carriers of general commodities with exceptions, collectively can provide regular-route service

The Commission's denial of a certificate was pursuant to statutory authority.[21] Its decision is supported by adequate findings and conclusions based on substantial evidence.[22] One of the basic ingredients in the determination of public convenience and necessity is the adequacy of existing service, and the applicant has the burden of producing evidence to show that the proposed service to the extent to be authorized by the certificate is or will be required by the present or future public convenience and necessity.[23] Adequacy of existing services is a proper subject of consideration in this field.[24] The Commission's conclusions are not vulnerable merely because they overruled those of the examiner. The Commission, not the examiner,

---

throughout the area involved serving Salt Lake City. As to those points involved not directly within their own operating authorities, service is provided by interlining with other motor carriers . . . They are willing and able to provide a scheduled pickup and delivery service at the airport conducted on a 24-hour basis, 7 days a week . . . Although an increase in airfreight traffic is anticipated, the evidence is not convincing that such increase will occur outside the terminal area, from and to which the bulk of this traffic now moves. Applicant's unauthorized operations outside of this terminal areas have deprived authorized carriers of traffic they are qualified to transport . . . Further, there is no evidence that the abundant existing service is inadequate in any material respect to meet supporting witnesses' needs."

[21] 49 U.S.C § 307(a) provides that "a certificate shall be issued to a qualified applicant therefor . . . if it is found . . . that the proposed service . . . is or will be required by present or future public convenience and necessity; otherwise such application shall be denied. . . ."

[22] *Riss & Co., Inc.* v. *United States*, 100 F. Supp. 468 (D.C. W.D. Mo. 1951) aff'd. 342 U. S. 937 rehrg. denied 343 U. S. 937; cf. *Public Service Commission of Utah* v. *United States*, 356 U. S. 421 (1958); *Utah Citizens Rate Association* v. *United States*, 192 F. Supp. 12 (D.C. Utah 1960), aff'd. 365 U. S. 649.

[23] *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153 (S. D. N. Y. 1948); *Quickie Transport Company* v. *United States*, 169 F. Supp. 826 (D. C. Minn. 1959), aff'd. 361 U. S. 36.

[24] *Hudson Transit Lines Inc.* v. *United States*, 82 F. Supp. 153 (S. D. N. Y. 1948) aff'd. 338 U. S. 802; *Parkhill Truck Co.* v. *United States*, 198 F. Supp. 362 (D. C. Okl. 1961); *Filson* v. *I.C.C.* 182 F. Supp. 675 (D. C. Colo. 1960); cf. *Schaffer Transp. Co.* v. *United States*, 355 U. S. 83 (1957).

exercises the determinative judgment and discretion.[25] In this respect, also, the rational basis of the order is sufficient to require its approval.[26]

The order of the Commission is in all respects affirmed.

Dated this 31st day of March, 1965.

/s/ DAVID T. LEWIS
/s/ WILLIS W. RITTER
/s/ A. SHERMAN CHRISTENSEN

[25] *Pobbins* v. *United States*, 204 F. Supp. 78 (E.D. Pa. 1962).

[26] *Mississippi Valley Barge Line Co.* v. *United States*; supra, 292 U. S. 282 (1934); *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541 (1912); *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60 (1945); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946).

APPENDIX B

Regulation No. ER-407

UNITED STATES OF AMERICA
Civil Aeronautics Board
Washington, D. C.

Economic Regulations

Enactment of Part 222

Effective: June 12, 1964

Adopted: April 28, 1964

PART 222—AIR CARGO PICKUP AND DELIVERY ZONES; FILING OF TARIFFS; APPLICATION FOR AUTHORITY TO FILE

By Notice of Proposed Rule Making, 26 F.R. 8037, and Economic Draft Release No. 33, Docket 12951, the Board announced it had under consideration a new Part 222 of the Economic Regulations relating to the determination of zones for air cargo pickup and delivery services which may be provided pursuant to appropriate tariff filings. Therein the Board described the current practice under which an air carrier decides at which locations it wishes to provide pickup and delivery service (if at all) in and around a particular point certificated to receive air service, and files a pickup and delivery tariff with the Board setting them out. In deciding whether to accept or reject the tariff, the Board has used distance criteria. Generally speaking, tariff proposals for pickup and delivery service at distances extending beyond 25 miles either from the airport through which the carrier serves the particular point, or from the corporate limits of the city, have not been regarded as acceptable. In a number of instances, tariffs providing for services substantially beyond a 25-mile limit have been permitted to become effective, particularly at the more important certificated points.

The notice stated that the procedure of regulating terminal area services through tariff rejections under the 25-mile rule of thumb has been challenged both on a procedural

basis as well as with respect to substantive validity. In that connection, the Board noted the differing views of the various classes of air carriers which had been previously solicited as to the need for changes in the Board's air cargo pickup and delivery tariff procedures and policy.

The Board sought comments on a proposed rule which contemplated the acceptance of pickup and delivery tariffs for services (a) within an area of 50 miles of the municipal center of any point receiving air service, and (b) within any "authorized pickup and delivery zone" as might be specifically established by the Board for the major air cargo generating points. It also contemplated an application procedure under which pickup and delivery service could be considered to locations which had not been previously authorized pursuant to (a) and (b) above.

The Board's notice adverted to the jurisdictions of the Civil Aeronautics Board and the Interstate Commerce Commission in relation to air cargo pickup and delivery services. The Board's jurisdiction is confined to the acceptance or rejection of pickup and delivery tariffs filed under section 403(a) of the Federal Aviation Act as service "in connection with . . . air transportation" while the Interstate Commerce Commision must decide whether such surface transportation is a service which is "incidental to transportation by aircraft" under the Interstate Commerce Act and thus exempted pursuant to section 203(b)(7a) of Part II of that statute or alternatively, whether a certificate of public convenience and necessity must be issued by that Commission authorizing such service. The notice stated that obviously the Board and the Commission should strive to administer the respective Acts so that there is no undue conflict between what the Board considers "service in connection with . . . air transportation" and what the Commission considers service "incidental to transportation by aircraft." In this connection, the Interstate Commerce Commission instituted a rulemaking proceeding in October 1961 [1] to determine and prescribe by regulation the cir-

[1] Motor Transportation of Property Incidental to Transportation by Aircraft (No. MC-C-3437).

cumstances under which, and the areas or distances within which, the motor carriage of property in interstate or foreign commerce is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act.

In his Transportation Message to Congress of April 5, 1962, the President stated that he was "requesting the Chairmen of the Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Maritime Commission, to meet at frequent intervals to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions in the form of legislative or administrative action that will improve the regulatory process." Pursuant to the request, inter-agency committees have been established on Terminal Area matters, and Freight forwarder matters, and meetings for the consideration of their problems have been held on the Commission and staff levels.

In the Board's rulemaking proceeding, extensive comments were received as a result of the original notice and a supplemental notice, dated February 5, 1963, which sought specific information as to the adequacy of ICC licensed trucker services for air cargo pickup and delivery beyond the 25-mile zone.

On the basis of the extensive information which has been made available to the Board we have reached these conclusions: full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation.

There are numerous certificated points which have only limited pickup and delivery services or where such service

extends to the corporate limits of the community or only slightly beyond. This situation apparently reflects the current limited use of air cargo at these points. For these communities, it is clear that the Board's present procedure of accepting tariffs under the 25-mile rule of thumb is adequate and raises no significant regulatory question for either the CAB or the ICC.

We therefore need be concerned with only the relatively few major air cargo generating points—where today effective tariffs on file with the Board provide for extensive pickup and delivery services which, in several cases, go well beyond the 25-mile rule-of-thumb area. In those instances where true pickup and delivery services are provided in relatively small vans or straight trucks and geared to air carrier schedules, such services appear to constitute "service in connection with air transportation," and we have no reason to believe that such tariffs are not properly filed. Furthermore, to the extent that additional direct air carriers or air freight forwarders desire to file pickup and delivery tariffs of their own proposing similar service in these areas, they will also be accepted.

There remains the question of considering any requests by direct air carriers or air freight forwarders for extension of pickup and delivery services beyond the areas covered by existing tariffs or the established 25-mile rule-of-thumb area. The Board believes that this should be considered only on the basis of an application procedure (similar to that set forth in our notice of proposed rulemaking) which would provide for notice to and comments by interested persons. The Board will consider any such requests in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport. The Board would receive and consider any comments by over-the-road truckers and particularly any evidence as to whether the proposed service is in the nature of surface line haul.

Subsequent acceptance by the Board of air cargo pickup

and delivery tariffs under these standards would not, of course, interfere with the freedom of the ICC to determine whether the related motor transportation did or did not come within the section 203(b)(7a) exemption. The Board anticipates, however, that the ICC will give due and appropriate weight to the Board's findings that the contemplated services are truly air cargo pickup and delivery in nature, as it does today.

In consideration of the foregoing, the Civil Aeronautics Board hereby adopts, effective June 12, 1964, new Part 222 of its regulations (14 CFR Part 222), to read as follows:

Sec.

222.1 Applicability

222.2 Filing of tariffs

222.3 Service to locations not previously authorized.

§ 222.1 *Applicability.* This part is applicable to the provision of pickup and delivery services in connection with air transportation of property at any point within the United States or its territories and possessions by any carrier subject to Part 221 of the Board's Economic Regulations.

§ 222.2 *Filing of tariffs.* In accordance with the provision of Part 221 and this regulation, each carrier shall file tariffs covering all pickup and delivery services offered. Such tariffs will be accepted for filing if they meet the requirements of Part 221 of this subchapter and (a) provide for service to places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point, or (b) provide for service to places or areas included in other currently effective pickup and delivery tariffs on file with the Board, or (c) are authorized upon application of the carrier filed in accordance with section 222.3. A certification shall accompany each tariff filing identifying the category within which each pickup and delivery service falls.

§ 222.3 *Service to location not previously authorized.*

(a) *Application.* If a carrier, subject to this part, desires to file a tariff providing for pickup and delivery serv-

ice to any location(s) not authorized by section 222.2, such carrier shall file with the Board a written application for authority to do so. Such application, in an executed original and nineteen copies, shall be conspicuously entitled "Application for Tariff-filing Authority: Pickup and Delivery Zone"; shall clearly identify the location(s) for which tariff-filing authority is requested; shall state the reasons why service to such location(s) is deemed appropriate and set forth economic data and other facts relied upon; shall contain a notice that persons served may, within 15 days, file and serve an answer in support of or in opposition to the application; shall set forth the names and addresses of the persons required to be served and state that service has been made on all such persons by personal service or by registered or certified mail, and the date of such service. In the case of service by mail, the date of mailing shall be considered the date of service. Each copy of an application served pursuant to this part shall state that such service is made pursuant to Part 222 of the Civil Aeronautics Board's Economic Regulations.

(b) *Service of application.* A copy of each application shall be served upon such persons as the Board may designate in a particular case, and in all case shall be served upon each scheduled air carrier and air freight forwarder which regularly renders service to or from a point involved, and upon the Secretary, Interstate Commerce Commission, Washington, D. C. The Board shall also publish notice of the application in the Federal Register.

(c) *Answers.* Any interested person may file an answer with the Docket Section of the Board in opposition to or in support of an application. In the case of persons served by the applicant under paragraph (b) of this section, answers shall be filed no later than 15 days after the filing of the application. In the case of other interested persons, answers shall be filed no later than 15 days after publication of notice of the application in the Federal Register. An answer shall be filed in an executed original and nineteen copies. It shall set forth in detail the reasons for the position taken and include such economic data and facts as are relied upon. It shall also be served upon the applicant

and state the date of such service. Unless ordered by the Board upon application or upon its own motion, further pleadings will not be entertained.

(d) *Order of approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.

(e) *Effectiveness of authority.* Authority to include any location(s) in a pick-up and delivery tariff granted pursuant to the procedure of this section shall be subject to revision or revocation without evidentiary hearing.

(Section 204(a), 72 Stat. 743; 49 U.S.C. § 1324. Interpret or apply Section 403; 72 Stat. 758, as amended by 74 Stat. 445; 49 U.S.C. § 1373)

By the Civil Aeronautics Board:

HAROLD R. SANDERSON,
Secretary.

(SEAL.)

(4699-5)

INDEX

	Page
Statement	1
Argument	4
	10

CITATIONS

Cases:

City of Philadelphia v. *C.A.B.*, 289 F. 2d 770	7, 8
Flying Tiger Line, Air-Truck Service, 30 C.A.B. 242, affirmed on other grounds *sub nom. City of Philadelphia* v. *C.A.B.*, 289 F. 2d 770	8
Kenny Extension-Air Freight, 49 M.C.C. 182, 61 M.C.C. 182	7
Railway Express Agency, Inc. v. *C.A.B.* (No. 18,868, C.A.D.C., decided March 18, 1965)	9
Sky Freight Delivery Service, Inc., Com. Car. Application, 47 M.C.C. 229	7
Teterboro Motor Transp., Inc., Com. Car. Application, 47 M.C.C. 247	7
Wycoff Co. v. *United States*, No. C 108-62, D. Utah, decided March 31, 1965	5

Statutes and Rules:

Air Commerce Act of 1926, 44 Stat. 568	8
Civil Aeronautics Act of 1938, 52 Stat. 973	8
Federal Aviation Act:	
Section 101(3), 49 U.S.C. 1301(3)	6
Section 101(21), 49 U.S.C. 1301 (21)	8

Statutes—continued	Page
Section 401(a), 49 U.S.C. 1371(a)	5
Section 408(a), 49 U.S.C. 1378(a)	5
Section 1003, 49 U.S.C. 1483	9
Interstate Commerce Act, Part II, 49 Stat. 543, as amended:	
Section 203(a)(10)	7
Section 203(b)	6, 8
Section 203(b)(7a)	2, 3, 5
Section 206(a)	5
Section 209(a)	5
Interstate Commerce Act, Part IV, 56 Stat. 284, as amended:	
Section 402(a)(7)	9
Motor Carrier Act of 1935, 49 Stat. 543	8
Miscellaneous:	
Conference Report on Air Commerce Act of 1926, 67 Cong. Rec. 9389	8
H. Rep. 1172, 77th Cong., 1st Sess.	9
Second Report of the Federal Coordinator of Transportation, S. Doc. 152, 73d Cong., 2d Sess., pp. 44-45	8

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1004

AIR DISPATCH, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(e), of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court entered January 18, 1965,

dismissing an action to set aside an order of the Interstate Commerce Commission adopting rules interpreting Section 203(b)(7a) of the Interstate Commerce Act, which exempts from economic regulation by the ICC motor transportation of persons or property that is "incidental to transportation by aircraft". The rules provide that motor transportation of property will be considered "incidental to transportation by aircraft"—and hence not subject to ICC regulation—when the motor transportation is confined to "collection, delivery, or transfer service performed within the terminal area" described in a valid tariff filed with the CAB by "the direct air carrier or air freight forwarder (indirect air carrier) providing the line-haul transportation", and is confined to shipments which "have been received from or will be delivered to a direct air carrier or air freight forwarder as part of a continuous movement . . . performed on a through bill of lading" covering both the air and motor transportation. The Commission reserved the right to determine "whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within * * * [the rule above described] should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or air freight forwarder holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers

or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board."[1]

These rules were promulgated after consultation between the ICC and the CAB and were published in the Federal Register the same day that CAB rules regulating motor pickup and delivery of freight incidental to air transportation were published. The CAB rules require carriers to file tariffs with the CAB for pickup and delivery service in connection with air transportation, which "will be accepted for filing" if the service is performed within a radius of 25 miles "of the airport or the city limits of the certificated point," or if the CAB grants special permission for services to be performed beyond that limit, or if the service is performed to "places or areas included in other currently effective pickup and delivery tariffs on file with the Board" (J.S. 37a-39a).

The ICC regulations were challenged in the court below on the ground that a combination of ground and

---

[1] The rules also exempted motor transportation that is substituted for air transportation in emergency situations arising from the direct air carrier's inability to perform the air transportation due to causes beyond its control and is performed on a through bill of lading and at the expense of the direct air carrier or the air freight forwarder. They further provide that an air freight forwarder subject to economic regulation under the Federal Aviation Act may receive freight from or deliver it to motor common carriers subject to regulation under Part II of the Interstate Commerce Act and not within the exemption of Section 203(b)(7a) without being considered subject to ICC regulation under Part IV of the Interstate Commerce Act if it does not assume responsibility for or receive compensation for the carriage performed by the motor carrier. See J.S. 40a-42a.

air transportation provided under a single through bill of lading (*e.g.*, by air freight forwarders) is subject to the exclusive jurisdiction of the CAB, which alone may regulate the scope of such operations. The district court dismissed the complaint, holding that "the I.C.C. has the jurisdiction to define the scope of the exemption in Section 203(b)(7a)" (J.S. 6a). In the proceeding below, the CAB filed an *amicus curiae* statement that the Commission has authority "to initially determine" the scope of exemptions from its authority, and pointed out that "[t]here is no conflict between the Board and the Commission, and the regulations of the two agencies were adopted in an effort to reach a practical accommodation with respect to the problems involved."

ARGUMENT

The issue raised on this appeal is in many respects premature and there is no substantial question now warranting plenary consideration by this Court. The Interstate Commerce Commission's rules defining the scope of the exemption from Commission authority of motor carriage incidental to transportation by aircraft were formulated in cooperation with the Civil Aeronautics Board. Without binding itself for the future, the Commission promulgated rules defining the scope of the motor carrier exemption largely by reference to standards adopted by the CAB for air carriers providing motor carrier pickup and delivery service in connection with air transportation. The Commission's rules establish no new policy, but are generally a

codification of principles established in prior adjudicatory proceedings. The asserted potential conflict or overlap between the ICC and CAB regulatory jurisdictions has not occurred and may never occur.

In any event, we submit that the court below properly held that the rules were lawfully promulgated pursuant to statutory authority vested in the Commission by the Motor Carrier Act.[2] That Act places primary responsibility upon the Commission for the regulation of interstate motor carriage. All common and contract carriers by motor vehicle subject to Part II of the Interstate Commerce Act are required by Sections 206(a) and 209(a) of that Act to obtain a certificate of public convenience and necessity or a permit from the Commission. Within a limited sphere the CAB also has jurisdiction over surface transportation that is performed in connection with air transportation. It is pursuant to Section 403(a) of the Federal Aviation Act that the CAB is concerned with motor pickup and delivery service that is performed in connection with air transportation.[3]

---

[2] A recent three-judge court decision, *Wycoff Co.* v. *United States*, (No. C 108-62, D. Utah, decided March 31, 1965) sustained the order of the Commission denying exempt status to a motor carrier for operations extending up to several hundred miles from an airport. The Commission relied in part upon the rule here challenged. Relying upon the instant case, the court held that the Commission had authority to issue the rules under § 203(b)(7a).

[3] Section 401(a), 49 U.S.C. 1371(a) provides:

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board

The Federal Aviation Act, however, establishes no criteria for determining when ground transportation services that have some connection to air transportation are subject to CAB authority and when they are subject to ICC authority. To determine the respective jurisdictions, Congress, in the Civil Aeronautics Act of 1938, amended the Interstate Commerce Act, by exempting from Commission economic regulation motor transportation that is "incidental to transportation by aircraft." As so amended, Section 203(b) of the Interstate Commerce Act provides:

> Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft * * *.

The Commission has no authority to impose economic regulations on exempted carriage. But the scope of the exemption must, of course, be defined, and power to make the necessary determinations must be lodged somewhere. Because the exemption is a part of the Act administered by the Interstate Commerce Commission, and the subject

---

authorizing such air carrier to engage in such transportation."

Section 101(3), 49 U.S.C. 1301(3), definies "air carrier" as a "citizen of the United States who undertakes, whether directly or indirectly * * * to engage in air transportation."

matter is motor transportation, it was natural to place initial authority to define the excepted area in the Commission. The Commission has in fact done so on many occasions. See, *e.g.*, *Sky Freight Delivery Service, Inc., Com. Car. Application*, 47 M.C.C. 229; *Teterboro Motor Transp., Inc., Com. Car. Application*, 47 M.C.C. 247; *Kenny Extension—Air Freight*, 49 M.C.C. 182; 61 M.C.C. 587. The CAB agrees that the Commission has primary responsibility for defining the scope of the exemption. And the Court of Appeals for the District of Columbia Circuit, in *City of Philadelphia* v. *C.A.B.*, 289 F. 2d 770, has expressly so recognized. In sustaining the Board's finding that a motor pickup and delivery service to and from Philadelphia, Pennsylvania in conjunction with air freight service to Newark, New Jersey constituted "air transportation" to Philadelphia within the meaning of the Federal Aviation Act and was in accord with the terms of a certificate requiring air service to Philadelphia, the court quoted approvingly from the Board's decision:

> Whether the * * * truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Act, and thereby exempt from economic regulation under that statute, is a matter for the Interstate Commerce Commission. We do not intend that our action here should influence what that decision should be. (289 F. 2d at 774-775).

Appellant relies upon Section 203(a)(10) of the Interstate Commerce Act, which defines interstate commerce to include commerce partly by motor ve-

hicle and partly by rail, express, or water—but does not mention commerce moving partly by air—and upon Section 101(21) of the Federal Aviation Act, *supra*, defining "interstate air transportation," to include commerce moving partly by air and partly by "other forms of transportation", to sustain the contention that Congress intended to "place all through-bill joint air-motor transportation exclusively under the economic control of the Civil Aeronautics Board" (J.S. 9). But these statutory definitions cannot be so read.[4] If appellants were correct, it would be difficult to understand why Section 203(b) of the Interstate Commerce Act expressly reserves to the Commission authority over "qualifications and maximum hours of service of employees and safety of operation or standards of equipment" of motor carriers providing service incidental to transportation by aircraft. Appellants' argument that through air-motor transportation is under exclusive CAB control is, moreover, inconsistent with

---

[4] The legislative histories of both the Motor Carrier Act of 1935, 49 Stat. 543 and the Civil Aeronautics Act of 1938, 52 Stat. 973, show that the clauses in the two definitions referring to transportation in part by air or motor and in part by another mode of transportation were added to prescribe the scope of Federal regulation of intrastate movements, and had nothing to do with reducing ICC jurisdiction over motor transportation. See Second Report of the Federal Coordinator of Transportation, S. Doc. 152, 73d Cong., 2d Sess., pp. 44-45; Conference Report on Air Commerce Act of 1926, 44 Stat. 568, 67 Cong. Rec. 9389; and *Flying Tiger Line, Air-Truck Service*, 30 C.A.B. 242, 255, affirmed on other grounds *sub nom. City of Philadelphia* v. *C.A.B.*, 289 F. 2d 770 (C.A.D.C.).

Section 402(a)(7) of the Interstate Commerce Act, 49 U.S.C. 1002,[5] which, in effect, provides for separate regulation, by the CAB and the ICC, of the respective air and land portions of freight forwarder service. And the argument makes nonsense of Section 1003 of the Federal Aviation Act, 49 U.S.C. 1483,[6] which provides for a joint CAB-ICC board to regulate through air-land transportation services when performed under joint rates, obviously assuming that each agency will regulate the appropriate phase of the service when separate rates are stated.[7]

---

[5] This section brings all surface forwarder service within the jurisdiction of the Commission, except "that part" of the forwarder's service for which he uses an air carrier or an incidental motor carrier. The House report cited by appellants states in the sentence following the one quoted by appellants (J.S. 10): "To the extent that a particular company is engaged in both surface and air forwarding operations, such company will, as to its surface forwarding operations, be subject to regulation under Part IV [of the Interstate Commerce Act], and, as to air forwarding operations, subject to the Civil Aeronautics Act." H. Rep. 1172, 77th Cong., 1st Sess., p. 7.

[6] Section 1003 provides in part:

"Air carriers may establish reasonable through service and joint rates, fares, and charges with other common carriers; except that with respect to transportation of property, air carriers not directly engaged in the operation of aircraft in air transportation (other than companies engaged in the air express business) may not establish joint rates or charges, under the provisions of this subsection, with common carriers subject to the Interstate Commerce Act."

[7] *Railway Express Agency, Inc.* v. *C.A.B.* (No. 18,868, C.A.D.C., decided March 18, 1965), which is cited in appellant's "Supplement to Jurisdictional Statement", merely

CONCLUSION

For the foregoing reasons, we submit that this case presents no substantial question warranting review by this Court and that the judgment below should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

LIONEL KESTENBAUM,
I. DANIEL STEWART, JR.,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

LEONARD S. GOODMAN,
Assistant General Counsel,
Interstate Commerce Commission.

APRIL 1965.

---

held that Section 1003 does not permit a surface carrier to engage in indirect air carriage without proper certification from the CAB. The court noted that the section "provides a procedure for regulation of rates and practices in cases where an air carrier arranges with a surface carrier for through transportation services" when each carrier is operating within the proper scope of its authority.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1965 771305 763

Office-Supreme Court, U.S.
FILED
MAY 18 1965
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1964.

No. 1004.

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC., FILM CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. and AIR FREIGHT FORWARDERS ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

ARTHUR R. LITTLETON,
HAROLD S. SHERTZ,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109.
Attorneys for Appellants, Air Dispatch, Inc., National Film Carriers, Inc., and Film Carrier Conference.

Of Counsel:
MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa. 19109

May 18, 1965.

International, 711 So. 50th St., Phila., Pa. 19143

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 1094.

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC.; FILM CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND AIR FREIGHT FORWARDERS ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF IN OPPOSITION TO THE MOTIONS TO AFFIRM.

Many of the arguments raised in the Motions to Affirm filed herein have been answered in the Jurisdictional Statement and Supplement thereto. Appellants will therefore confine this brief to the arguments made by the appellees not covered at length heretofore.

The government initially raises the point that the appeal in this case is premature and collaterally that there

is no substantial question for consideration of this court at this time.

This is an appeal raising the question as to the validity of regulations by an independent agency. While the regulations can be characterized as only statements of future policy to be followed by the I. C. C. and it can be said that there has been no injury since the policy has not yet been put into effect, the regulations are no less prejudicial to the involved carriers. The regulations are specific and detailed and, since promulgated by the regulating body, they are manifestly the *decision* of that body.

As was said by this court in *Columbia Broadcasting System v. United States*, 316 U. S. 407, 422 (1942), in permitting a similar appeal, "The regulations are avowedly adopted in the exercise of [rule making] power", and "they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power."

Certainly, were these regulations now in effect, air freight forwarders would be ill-advised to purposely expend time and money in the investment of motor vehicles, advertising, solicitation and servicing beyond the scope of the regulations merely to create a case with which to test their validity, knowing the predetermined position of the regulatory agency.

An appealable "order" is not limited to an agency action which culminates in an adjudication, but is, in practical operation, appealable if it is, in effect, a rule-making decision which will govern the subsequent action of the regulated carriers.

In *Flemming v. Florida Citrus Exchange*, 358 U. S. 153, 168 (1958) an order of the Secretary of Health, Education and Welfare, "promulgated as a general rule, prospective in operation" was held to be a proper subject for court appeal even though there existed a temporary legislative stay of its operation.

Consequently, it is respectfully submitted that inasmuch as the I. C. C. regulations in question are prospective in nature and restrictive of the now existing *status quo*, the validity of such regulations is a proper question for this court.

The alternative is either to have air freight forwarders operate within the confines of the regulations without a test as to their validity or to expend time, effort and investment capital in the establishment of an operation which, if successful, *might* at some future unknown time cause a competitor (or the I. C. C.) to bring a complaint under the regulations and seek a cease and desist order.

It is unthinkable that the fundamental validity of these administrative regulations must abide the happening of such an undeterminable event and require the expenditure of untold dollars and hours by aggrieved parties.

The intervenors assume that the appellants would remove all motor transportation preceded or followed by transportation by aircraft from the sweep of the Interstate Commerce Act.

This is not an accurate statement of appellant's position. It was made clear in the opening paragraphs of the Jurisdictional Statement that the only transportation here involved was that performed under "through air bills of lading providing a bona fide pick up and delivery service by motor vehicle operating in a continuous movement in air-motor transportation."

While the verbal distinction is slight, there is an extensive difference between this and motor transportation preceded or followed by aircraft transportation.

Appellants are concerned only with the now asserted I. C. C. control over through air bill transportation performed by a C. A. B. authorized air carrier. Appellants have not and do not argue the extreme, that motor transportation from Chicago to Philadelphia followed by air transportation to Newark would come under C. A. B. au-

thority, *unless* such transportation is performed by a C. A. B. approved carrier on a through air bill. While it is highly unlikely that any such authorization would be granted by the C. A. B., if *granted*, the proper forum for protests or examination of the grant is the C. A. B. and appeal procedure thereunder and not an independent hearing before the I. C. C.

The government's Motion to Affirm flatly states that the Interstate Commerce Act places primary responsibility upon the Commission for the regulation of interstate motor carriage and that C. A. B. has a "limited sphere" of jurisdiction over surface transportation performed in connection with air transportation.

These mere conclusions do not answer the extensive arguments raised in the Jurisdictional Statement concerning the limitation of I. C. C. jurisdiction over motor vehicle transportation "partly by rail, express or water". These assertions are no response to the demonstrated legislative intent that the C. A. B. is to exclusively control and regulate "air transportation" and all its many facets.

It is clear that while the Commission has the right to initially interpret the exclusion created by Section 203 (b)(7a), it does not have the right or the power to interpret this exclusionary language as giving it control over motor transportation by a C. A. B. approved air carrier to which C. A. B. control is *subordinate*.

The mere fact that the C. A. B. agrees that the I. C. C. has the right to so construe the exclusion is of little force since it is a basic concept of administrative law that an agency cannot surrender, transfer or otherwise fail to exercise the jurisdiction given to it by the legislature, particularly in favor of another agency's exercise of such jurisdiction.

To maintain the delineation between regulation of motor carriers and air carriers the Congress injected complimentary exclusions and inclusions in the two Acts.

In the Motor Carrier Act it *excluded* transportation partly by motor carriers and partly by aircraft, by limiting the jurisdiction to that partly by motor vehicle and partly by rail, express or water. On the other hand it *extended* to C. A. B. jurisdiction over transportation partly by aircraft and partly by other modes of transportation without limitation.

Section 203(b)(7a) was made part of the Interstate Commerce Act by Section 1107(j) of the Civil Aeronautics Act of 1938. The only realistic interpretation can be the intent to exclude I. C. C. from exercising powers solely granted by the Act to C. A. B.

The Motions to Affirm lay some stress on the fact that the Commission has had reserved to it the *express* authority over "qualifications and maximum hours of service of employees and safety of operation or standards of equipment" of motor carriers, including motor carriers providing service incidental to transportation by aircraft.

Appellants' argument is not inconsistent with this express authority as such authority extends to all interstate motor vehicle transportation, whether by common, contract or private carriage. All must concede that the Commission has absolutely no authority to regulate private interstate commercial traffic and yet, the Commission retains control over the qualification and maximum hours of service within such private transportation.[1]

The private carrier is a prime example of the fact that there can be excluded from the Commission's regulatory power great areas of interstate motor vehicle transportation without such exclusion being inconsistent with the qualification and maximum hours provision of the Interstate Commerce Act. Certainly if all private carriage can be and is so excluded, the small portion of total interstate traffic moving by motor vehicle under a through air bill of lading can be excluded and yet control over the safety factors be retained by the Commission.

---

1. 49 U. S. C. A. § 204(a)(3).

The Motions to Affirm seek to obscure the issue by seeking to differentiate between motor transportation "incidental to transportation by aircraft" and "services in connection with air transportation".

Actually the two terms are synonymous. This is true both practically and as a matter of statutory construction.

The order,[2] sets forth the C. A. B. regulations relative to the filing of tariffs by air carriers so as to prescribe air cargo pickup and delivery zones. Section 222.3(d) [3] makes the test of filing such tariffs by air carriers the finding that the proposed tariffs involve service in connection with air transportation.

This is in conformity with the statutory authority of Section 403 that every air carrier shall file tariffs showing rates "in connection with such air transportation." C. A. B. in its order found [4] bona fide collection and delivery by motor vehicle to be necessary for it to carry out the legislative policy to encourage and develop air transportation adapted to the present and future needs of the commerce of the United States.

The Commission in the *Kenney* case (which the order is said to confirm) found that bona fide collection and delivery service in connection with a through and continuous movement under the air bill of lading of an air carrier, within the area shown by tariff for such service on file with C. A. B., was incidental to transportation by aircraft.

The lower court reached the same conclusion and found that the transportation here in question was an integral part of air transportation.[5]

There appears to be some difference in opinion between the intervenors and the United States as to the effect of

---

2. Page 37a of Jurisdictional Statement.
3. Page 39a of Jurisdictional Statement.
4. At page 30 of Intervenors' Motion to Affirm.
5. Page 2a of Jurisdictional Statement, 2nd full paragraph.

Section 1003 of the Federal Aviation Act. The government argues that the appellants' position makes "nonsense" of this section since that section provides the desired joint C. A. B.-I. C. C. regulation.

That this section is not the clear panacea for the basic problem raised in this appeal is evident from the position taken by the intervenors that the casual suggestion of the District Court as to the applicability of the section was in error.

The proposals of the I. C. C. in its annual report to Congress in 1964 and statements by C. A. B. officials that this section should be strengthened and amended so as to clearly be available to handle problems of service between the two agencies further illustrate our point. In fact, the chairman of the two agencies here involved are co-sponsors of legislation to create joint boards as clearing houses for overlapping activities between the various independent agencies.

The intervenors admit that conflicts between the C. A. B. and the I. C. C. may arise under the proposed regulations but argue that only when these conflicts arise should there be any judicial determination.

The intervenors further point out that there is nothing unusual in the division of authority between two agencies. It is *most unusual*, however, for two such agencies to divide authority by creating blatantly overlapping areas of regulation, as was done here, by the Commission reserving unto itself the right to cancel, on its own motion, at an indefinite future time, previously granted C. A. B. authority.

It is impractical and prejudicial to demand that obvious areas of conflict not be clarified or removed except upon the expenditure of time and money in the development of a service which *might* later be held illegal by one agency while having received the stamp of approval by another.

To allow such a sword of Damocle's to exist and obviously restrict the proper expansion of the needed air freight industry was not contemplated by Congress and should

not be permitted to exist to impede the national transportation program.

For the above reasons and because of the reasons detailed in the Jurisdictional Statement, Appellants respectfully submit that probable jurisdiction should be noted.

Respectfully submitted,

ARTHUR R. LITTLETON,
HAROLD S. SHERTZ,
Attorneys for Appellants Air Dispatch, Inc., National Film Carriers, Inc. and Film Carrier Conference.

Of Counsel:

MORGAN, LEWIS & BOCKIUS.

Office-Supreme Court, U.S.
FILED
MAY 18 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1004

AIR DISPATCH, INC., *et al.*, *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF OF APPELLANT AIR FREIGHT FORWARDERS ASSOCIATION IN OPPOSITION TO MOTIONS TO AFFIRM

LOUIS P. HAFFER
ROBERT M. BECKMAN
HAFFER & BECKMAN
703 Ring Building
Washington, D. C. 20036

Attorneys for Appellant Air Freight Forwarders Association

May 18, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
I. The ICC's Motion Ignores the Agency Action Underlying This Appeal	2
II. The United States and ICC Appear to Doubt the Propriety of the Decision of the Court Below	4
III. The Justification for the Decision Below is Weak and Unconvincing	5
IV. The ICC's Jurisdiction in Certification Cases is Irrelevant to the Issues on Appeal	13

TABLE OF CITATIONS

CASES:

Pan American Airways v. U.S., 371 U.S. 296 (1963) .. 5

Wycoff Company, Inc. v. United States and Interstate Commerce Commission, D.C.D. Utah, 1965 13

STATUTES:

Federal Aviation Act

Section 1003 10

Interstate Commerce Act

Section 202(c), 49 U.S.C. § 302(c) 7
Section 203(b), 49 U.S.C. § 303(b) 9, 13
Section 303(f), 49 U.S.C. § 903(f) 7
Section 402(a)(7), 49 U.S.C. § 1002(a)(7) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1004

AIR DISPATCH, INC., *et al.*, *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

BRIEF OF APPELLANT AIR FREIGHT FORWARDERS ASSOCIATION IN OPPOSITION TO MOTIONS TO AFFIRM

Appellant hereby answers both the Motion to Affirm filed by The National Association of Motor Bus Owners, *et al.* and the Motion to Affirm filed by the United States and the Interstate Commerce Commission.

I

The ICC's Motion Ignores the Agency Action Underlying This Appeal

This case arose out of the effort of the Civil Aeronautics Board to extend the benefits of air transportation of property beyond the 25-mile area within which it has been confined since World War II. This Court can judicially notice the explosion of population and commerce beyond a rigid 25-mile radius of airport cities. Industries located beyond the 25-mile pale are today denied the benefits of integrated air-ground transportation provided by direct air carriers and indirect air carriers (air freight forwarders).

The CAB proposed an expansion of terminal pick-up and delivery areas to 50 miles and even farther around New York and Chicago, in recognition of the modern spread of commerce and industry. The ICC, at the instance of its regulated motor trucking industry, opposed this expansion. The CAB capitulated to the ICC and withdrew its proposed expansion. It ceded to the ICC *final* determination of the scope of services which may be offered by *air* carriers.[1]

The United States and ICC's Motion to Affirm claims these events never occurred. It asserts,

> "The Commission's rules establish no new policy, but are generally a codification of principles established in prior adjudicatory proceedings." (pp. 4-5)

Contrary to the ICC's assertion, there has *never* been an adjudicatory proceeding, before either the CAB or ICC, which held that the ICC was the final arbiter

[1] "Air Carriers" include both airlines (direct air carriers) and air freight forwarders (indirect air carriers).

of "air transportation" as defined in the Federal Aviation Act or that the ICC could and would overrule a CAB determination of the proper scope of pick-up and delivery service by *air-carriers*—and the ICC cites none.

The ICC-CAB agreement, subject of the litigation below, *does* establish a new policy. It is a dramatic reversal of roles theretofore adopted: the ICC had never overruled, or asserted its power to overrule and supersede a CAB determination of the scope of an air carrier terminal area. The new rules give the ICC that power.

The ICC's Motion to Affirm also incorrectly states,

> "The asserted potential conflict or overlap between the ICC and CAB regulatory jurisdictions has not occurred and may never occur." (p. 5.)

The conflict has occurred. It is the subject of this litigation. The CAB proposed an expansion of air carrier terminal areas. The ICC vetoed the expansion. It matters not that the conflict was "resolved" by informal processes rather than formal adjudication. The result is the same and it did happen.

The ICC says that, under the ICC-CAB agreement, future conflict will not be likely to arise. This may well be true but only because the CAB has abdicated to the ICC. There may be no conflict only because the CAB has surrendered in its effort to break the bonds confining air transportation to narrow rings around airport cities.

The fact that there is peace between the agencies itself is the strongest reason for this Court to act. Only by telling the CAB that it has the statutory responsi-

bility and duty to define air transportation, and that it cannot cede this statutory authority to the ICC, will air transportation be expanded to accord with modern economic needs—and only then will each agency be remitted to its proper statutory function.

II

The United States and ICC Appear to Doubt the Propriety of the Decision of the Court Below

The Court below held that the ICC had single and complete jurisdiction to define the scope of air service terminal areas. It said,

> "We find that the ICC has the jurisdiction to define the scope of the exemption granted in Section 203(b)(7a)."

The United States and ICC apparently do not want to defend this flat holding here. They concede that,

> "The CAB also has jurisdiction over surface transportation that is performed in connection with air transportation." (Motion to Affirm, p. 5.)

The United States and the ICC, in their Motion to Affirm, do not squarely face and defend the Court's unequivocal holding that the ICC has final authority on this question. They claim that Congress placed "*initial* authority to define the excepted area in the Commission" (p. 7). They contend that the CAB agrees that "the Commission has *primary* responsibility for defining the scope of the exemption" (p. 7).

These statements reverse what really happened. The ICC-CAB agreement placed "*initial* authority" in the CAB, *subject to ICC veto*. The agreement gave the CAB "*primary* responsibility" to accept or reject air carrier tariffs, subject to *final* determination by the ICC.

The significance of this effort to reverse the actual allocation of agency responsibility and authority cannot be overstated. It constitutes an implicit recognition of the vital weakness of the ICC-CAB agreement and the error of the decision of the Court below in sustaining it.

III

The Justification for the Decision Below Is Weak and Unconvincing

The Court below held that the ICC had final jurisdiction to determine when motor transportation is air transportation within air carrier terminal service areas on the sole basis that this determination "must logically fall on the Commission" because the Commission has authority to regulate the rest of motor transportation and also has safety and hours-of-work regulatory authority even within air terminal service areas. Nowhere in the Court's opinion is there any indication that it made a thorough and searching analysis of the purpose and intent of the Federal Aviation Act and the Interstate Commerce Act, which the Court has held is the proper basis for determining such questions. See *Pan American Airways* v. *U.S.*, 371 U.S. 296 (1963).

The Motion to Affirm filed by the United States and ICC makes no reference to Congress' purpose and intent in creating a new agency, the Civil Aeronautics Authority (now the Civil Aeronautics Board), to foster and develop air transportation. The appellees are content to assert that "it was natural" to vest this authority in the Commission (p. 7).

There is nothing in either logic or nature which supports the inference that when Congress expressly rejected early bills giving the ICC authority over air

transportation, and instead, committed regulation to a new and independent agency, it intended that the ICC should hold a veto over the CAB's determination of the scope of air transportation. Rather, the creation of a new agency, the definition of "air transportation" to include commerce "partly by aircraft and partly by other forms of transportation," and the express exclusion of ICC economic regulation from "transportation of persons or property by motor vehicle when incidental to transportation by aircraft," evidence a clear Congressional intent that the infant air transportation industry, with such a vast potential, should not be entrusted to a hostile guardian.

The Civil Aeronautics Act represented a studied Congressional decision to assign the development of air transportation to an agency with a deep understanding of the present and future needs of *air* transportation. Neither "logic" nor "nature" justifies subjecting the expansion of air transportation terminal service areas to an agency alien to its interests and hostile to its needs, that is, to the ICC; and the CAB's acquiescence in this perversion of Congressional intent only emphasizes, and cannot cure, the wrong.

The ICC, and the Intervenors, try to explain away the fact that the Federal Aviation Act alone defines transportation as partly by air and partly by surface; and the fact that the Interstate Commerce Act gives the ICC no jurisdiction over any movement by air. The flaw in this undertaking is emphasized by the fact that the ICC and the Intervenors offer *different* rationalizations for these unyielding statutory provisions.

The ICC claims the definitions "were added to prescribe the scope of Federal regulation of intrastate

movements" (p. 8, n. 4). The Intervenors say the definition in the Interstate Commerce Act was "simply to make clear" that motor carriers are to be regulated under Part II of the Interstate Commerce Act even when joining with rail, water or express companies (pp. 4-5).

Neither of these explanations is acceptable. Neither has support in the legislative history. The Intervenors' explanation is contrary to Section 202(c) of the Interstate Commerce Act, 49 U.S.C. 302(c), which provides that when transportation is performed by motor vehicle by a railroad or water carrier "incidental to transportation or service subject to [Chapters 1 and 12, respectively], in the performance within terminal areas of transfer, collection, or delivery services," such transportation:

> "*shall be considered to be and shall be regulated as transportation subject to Chapter 1* of this title when performed by such carrier by railroad, *as transportation subject to Chapter 12* of this title when performed by such water carrier . . ." [Italics supplied.]

A similar provision appears in Part III of the Interstate Commerce Act regulating water carriers: Section 303(f), 49 U.S.C. § 903(f). When transportation by water is provided for a regulated railroad, motor carrier, or water carrier "within terminal areas of transfer, collection, or delivery service,"

> "such transportation *shall be considered to be performed* by such carrier or express company *as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such* services are incidental." [Italics supplied.]

Thus, Intervenors are wrong in stating that Section 203(a)(10) means that when motor carriers join with rail or water carriers or express companies "they are to be regulated under Part II and not under any other part of the Interstate Commerce Act" (p. 5). Rather, the Interstate Commerce Act evinces a scheme in harmony with Appellants' interpretation that Congress intended the CAB to have exclusive economic regulatory jurisdiction over motor carriage incidential to air transportation. *The above-quoted sections show that terminal area services incidental to another mode of transportation are to be considered "as part of and shall be regulated in the same manner" as the dominant mode.*

While Congress did not use this precise form of words at the time of enactment of the Civil Aeronautics Act of 1938, the words it did use are just as clear. It vested the CAB with jurisdiction over "air transportation," defined as commerce "partly by aircraft and partly by other forms of transportation." It removed from ICC jurisdiction "transportation of persons or property by motor vehicle when incidental to transportation by aircraft."

The use of the same words "incidental to" which appear in Sections 202(c) and 903(b) of the Interstate Commerce Act are no accident. They are used to carry out the same allocation of regulatory jurisdiction over terminal area operations by one mode of transportation for another mode: *the regulator of the dominant mode has exclusive economic regulatory jurisdiction over the operations of the mode performing "incidental" terminal area collection and delivery services.*

The United States and ICC claim that if appellants are correct, "it would be difficult to understand" why section 203(b) of the Interstate Commerce Act gives the ICC jurisdiction over safety regulation of motor carriers within the incidental to air zone (p. 8). There is no more difficulty in understanding why the ICC has jurisdiction over safety of motor carrier operation subject to CAB *economic* regulation than in understanding why the SEC has regulatory jurisdiction over security offerings by such carriers or why the FTC has antitrust jurisdiction over these same operations.

The concurrence of jurisdiction over *different* aspects of the activities by the same operators presents no difficulty. It certainly does not support the conclusion that because the ICC has safety jurisdiction it must also have economic jurisdiction. In fact, it does not. The Motion of the United States and ICC so concedes, as it must, since there is no quarrel with the plain statutory exemption from ICC *economic* regulation of the incidental-to-air terminal service areas. The United States and ICC state:

> "The Commission has no authority to impose economic regulations on exempted carriage." (p. 6.)

There are clearly numerous other operations under Section 203(b) such as motor vehicles operated by a cooperative association and motor vehicles used in newspaper distribution (subsections 5 and 7) which are expressly exempted from ICC *economic* control (and which are in fact under the *economic* control of no agency) but which are assigned to the ICC for

safety regulation. The ICC manifestly cannot find that plain statutory language "difficult to understand."

The real and only issue is not *whether* the CAB has exclusive jurisdiction over the incidental-to-air zones once these are determined; it unquestionably does. *The issue is which agency, the ICC or CAB, shall determine the reach of "air transportation," that is, to determine the limits of incidental-to-air transportation.*

The Motions of the United States and ICC and of the Intervenors raise additional arguments which only beg this question. The reference in both motions to a joint CAB-ICC board which may regulate joint rates and services is such an argument.[2] These statutory provisions, Section 1003 of the Federal Aviation Act, provide for regulation of through service and joint rates between ICC-regulated surface carriers and CAB-regulated direct air carriers.[3] To note that there can be through service by ICC-regulated surface carriers and CAB-regulated direct air carriers has no relation to the question here presented of which agency shall define the scope of CAB-regulated carriage.

Joint rates and through service, treated in Section 1003, are very different from the integrated service offered by *air* carriers, direct and indirect, at issue in the instant appeal. Joint service assumes truly ICC-regulated surface interstate commerce, on the one hand, and truly CAB regulated air commerce, on the other hand, which are combined with a single rate offered to

---

[2] U.S.-ICC Motion, pp. 9-10; Intervenors Motion, pp. 5-6.

[3] Section 1003 of the Federal Aviation Act expressly prohibits joint rates between indirect air carriers (air freight forwarders) and ICC-regulated surface carriers.

the customer, and a division of the revenues by the carriers, with each retaining carrier its separate identity as air transportation and surface transportation, respectively.

The service at issue in this appeal is provided solely by *air* carriers *under an airwaybill covering the entire movement.* The incidental-to-air portion of the haul is controled by the air carrier, is geared to its schedules, *and is a part of the total air movement.* To say that the CAB alone exercises economic regulatory jurisdiction over air carrier terminal services does not make "nonsense" of Section 1003 as urged by the United States and ICC (p. 9). Nor does it "ignore" or "render meaningless" that Section as contended by the Intervenors (pp. 5-6). Section 1003 simply has nothing to do with the issue on appeal. It provides for a different kind of transportation service.

Indeed, the Intervenor Appellees concede this point at the end of their Motion. They agree with Appellants that the Court below erred in relying on a joint board, created under Section 1003 of the Federal Aviation Act, as a means of resolving the conflict in agency jurisdiction here at issue. They state that the Court's statement "reflects a misreading of that Section," conceding that,

> "Whether the participants in through service have the requisite authority to perform transportation is a matter for independent determination, by the Board in the case of air transportation and by the Commission in the case of surface transportation" (p. 14, n. 5).

Similarly, the argument that Section 402(a)(7) of the Interstate Commerce Act, which provides for

separate regulation by the ICC of surface forwarder activities and excludes from the ICC's regulation that part of forwarding which uses an air carrier or an incidental-to-air motor carrier, only begs and throws no light on, the question which is the subject of appeal. To note that the ICC may regulate surface forwarding and may not regulate air forwarding is patently in no way inconsistent with the conclusion that the CAB, and the CAB alone, may determine the proper scope of air forwarding.

Finally, it should be noted that the Intervenors fundamentally misstate Appellants' argument. It is *not* Appellants' theory that "the Interstate Commerce Commission has no economic regulatory authority over any transportation by motor vehicle rendered in connection with transportation by air." (p. 4).

Appellants do not claim that all transportation by motor vehicle "in connection with" transportation by air is subject to the CAB. There are many movements which go beyond the airport terminal service areas. Those surface movements are subject to the economic regulation of the ICC.

Appellants claim only that those surface movements within the air service terminal areas, *i.e.*, those movements which are "incidental to transportation by aircraft," are excluded from ICC regulation, and the determination of what is "incidental to transportation by aircraft" is committed to the agency with special knowledge and experience in that field, the CAB.

IV

The ICC's Jurisdiction in Certification Cases Is Irrelevant to the Issues on Appeal

The Motions to Affirm make much of the fact that ICC is presented with and decides applications for certificates of public convenience and necessity which require it to determine whether the applicant is or is not operating exclusively within the incidental-to-air exclusion of Section 203(b)(7a). Both Motions cite the recent case of *Wycoff Company, Inc.* v. *United States and Interstate Commerce Commission,* D.C.D. Utah 1965, which affirmed the Commission's denial of a certificate to a motor carrier found to be not exempt under Section 203(b)(7a).

The *Wycoff* case, and the numerous ICC cases deciding certification issues, cited by Appellees and Intervenors, are beside the point at issue here. Those cases involve applications by *surface* carriers for certificate authority. It is not only appropriate, but necessary, that the ICC determine whether they are entitled to such authority.

The instant case does not involve surface carriers. It involves *air carriers.* Appellants are all air carriers duly authorized by the CAB to perform air transportation.

Appellants are here urging this Court to affirm the CAB's exclusive authority and duty to define the scope of *air carriers'* service in *air transportation* as defined by the *Federal Aviation Act.*

Nothing involved in this case will derogate from the ICC's authority to continue deciding certification ap-

plications of *surface carriers* performing *surface transportation* as defined by the *Interstate Commerce Act.*

Conflict between the two agencies arises only, as it has arisen here, when the ICC attempts to overrule a decision by the CAB as to the scope of air transportation provided by air carriers. If the CAB determines that an air carrier is providing air transportation within a bona fide air service terminal area, and the ICC believes the CAB has improperly defined the scope of the air service terminal, the ICC may appeal the decision to the courts. So may any aggrieved motor carrier.

Under the present arrangement, the ICC may simply overrule the CAB. This it should not be able to do. The development of air transportation has been set back 25 years by confining air service terminal areas to their pre-World War II definition. This Court should deny the Motions to Affirm and grant plenary consideration of these important issues.

Respectfully submitted,

LOUIS P. HAFFER
ROBERT M. BECKMAN
HAFFER & BECKMAN
703 Ring Building
Washington, D. C. 20036

Attorneys for Appellant
Air Freight Forwarders
Association

May 18, 1965